(13)

No. 94-1387-CFX Title: Yamaha Motor Corporation, U.S.A., et al., Petitioners
Status: GRANTED v.
Lucien B. Calhoun, etc., et al.

Docketed:
February 17, 1995 Court: United States Court of Appeals for the Third Circuit

Counsel for petitioner: Dryer,Jonathan

Counsel for respondent: Taylor,William J., Masterson Jr.,Thomas A.

Entry	Date	Note	Proceedings and Orders
1	Feb 17 1995	G	Petition for writ of certiorari filed.
3	Feb 21 1995		Order extending time to file response to petition until April 17, 1995.
4	Apr 17 1995		Brief of respondents Lucien B. Calhoun, et al. in opposition filed.
5	Apr 17 1995		Brief amicus curiae of National Marine Manufacturers Association filed.
6	Apr 19 1995		DISTRIBUTED. May 12, 1995 (Page 1)
8	May 15 1995		REDISTRIBUTED. May 19, 1995 (Page 13)
9	May 22 1995		Petition GRANTED. limited to question 1 presented by the petition. In addition to question 1 presented by the petition, the parties are requested to brief and argue the following question: "Under 28 U.S.C. Section 1292(b), can the Courts of Appeals exercise jurisdiction over any question that is included within the order that contains the controlling question of law identified by the District Court.?"
			**********
11	Jun 7 1995		Order extending time to file brief of petitioner on the merits until July 26, 1995.
12	Jul 5 1995		Joint appendix filed.
13	Jul 26 1995		Brief amicus curiae of National Marine Manufacturers Association filed.
14	Jul 26 1995		Brief amicus curiae of United States filed.
15	Jul 26 1995		Brief of petitioners Yamaha Motor Corporation, et al. filed.
16	Jul 26 1995		Brief amici curiae of American Steamship Owners Mutual Protection, et al. filed.
17	Jul 26 1995		Brief amicus curiae of Maritime Law Association of the United States filed.
19	Jul 31 1995		Order extending time to file brief of respondent on the merits until September 15, 1995.
20	Jul 31 1995	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
21	Aug 14 1995	D	Motion of Maritime Law Association of the United States for leave to participate in oral argument as amicus curiae and for divided argument filed.
22	Aug 24 1995		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Third Circuit.

2 pp

Entry	Date	Note	Proceedings and Orders
23	Sep 5 1995		SET FOR ARGUMENT TUESDAY OCTOBER 31, 1995. (2ND CASE).
24	Sep 7 1995		Record filed.
		*	Original record proceedings United States District Court for the Eastern District of Pennsylvania (BOX).
25	Sep 8 1995		CIRCULATED.
26	Sep 13 1995		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
27	Sep 13 1995		Motion of Maritime Law Association of the United States for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
28	Sep 15 1995	X	Brief amici curiae of National Conference of State Legislatures, et al. filed.
29	Sep 15 1995	X	Brief of respondents Lucien Calhoun, et al. filed.
30	Sep 15 1995	X	Brief amicus curiae of Association of Trial Lawyers of America filed.
31	Oct 10 1995	X	Reply brief of petitioners filed.
32	Oct 31 1995		ARGUED.

FILED
No. 941387 FEB 17 1995
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

YAMAHA MOTOR CORPORATION, U.S.A. and
YAMAHA MOTOR COMPANY, LTD.,
Petitioners

v.

LUCIEN B. CALHOUN and ROBIN L. CALHOUN,
Individually and as Administrators of the
Estate of Natalie K. Calhoun, Deceased,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Third Circuit incorrectly decided that the damages, if any, available to survivors of a victim of a fatal recreational boating accident which occurred in navigable territorial waters are determined under state law rather than according to the general federal maritime cause of action created by this Court in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970).

2. If the question presented above is decided affirmatively, petitioners also request that this Court decide the questions originally certified to the Third Circuit, to wit, whether, pursuant to the general maritime death action, respondents may recover: (1) damages for loss of society; (2) damages for lost future earnings; and/or (3) punitive damages.

PARTIES TO PROCEEDINGS BELOW

Petitioners/Defendants Below

Yamaha Motor Corporation, U.S.A. ("YMUS") was incorporated in California in 1976. Its principal place of business is 6555 Katella Avenue, Cypress, CA 90630. YMUS markets and distributes Yamaha motorized products including motorcycles, snowmobiles, generators, scooters, all-terrain vehicles, personal watercraft, outboard motors and golf cars.

Yamaha Motor Company, Ltd. ("YMC") was incorporated in Japan in 1955. Its principal place of business is 2500 Shingai, Iwata-Shi, Shizuoka-Ken, Japan. YMC manufactures motorcycles, all-terrain vehicles, boats, personal watercraft, snowmobiles, go-karts, generators and golf cars. YMC owns 100% of the stock of YMUS.

Respondents/Plaintiffs Below

Respondents, Lucien B. Calhoun and Robin L. Calhoun, are the parents of Natalie K. Calhoun, deceased, and are also the administrators of her estate.

Other Parties/Defendants Below

Palmas Del Mar Company; Palmas Del Mar, Inc.; Palmas Yacht Club, Inc.; Maxxam Properties, Inc.; ABC Corporation; XYZ Partnership(s); Candelero Hotel Corporation; and Marina De Palmas Shipyard, Inc. were named as defendants in the suit below. However, these parties were dismissed without prejudice from this action by stipulation approved by the district court below on February 12, 1991. App. 86a.

RULE 29.1 LISTING

YAMAHA CORPORATION

Subsidiaries and Affiliates

- Yamaha Motor Company, Ltd.
- Yamaha Motor Corporation, U.S.A.
- Yamaha Motor Manufacturing Corporation of America (incorporated in the State of Georgia)

While there are other Yamaha subsidiaries and affiliates, they are wholly-owned and/or not publicly traded.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW..... ii

Petitioners/Defendants Below..... ii

Respondents/Plaintiffs Below..... ii

Other Parties/Defendants Below iii

RULE 29.1 LISTING iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES..... vi

OPINIONS BELOW 1

JURISDICTION..... 2

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED 3

STATEMENT OF THE CASE 3

I. Factual Background 3

II. Proceedings Below 4

REASONS FOR GRANTING THE PETITION 6

I. The Decision Of The Court Of Appeals Is In Conflict With Decisions In The Second, Fifth, Sixth, Eighth And Ninth Circuits..... 7

II. The Decision Of The Court Of Appeals Is Inconsistent With Both Express Holdings And The Intent Of This Court 14

III. The Court Of Appeals' Decision Undermines The Fundamental Concept Of Maritime Uniformity 15

IV. The Question Presented Is Important — The Decision Of The Third Circuit Will Have Immediate And Widespread Impact Beyond The Parameters Of This Case..... 20

TABLE OF CONTENTS—*(Continued)*

Page

DAMAGES RECOVERABLE IN A GENERAL MARITIME ACTION 21

CONCLUSION 23

TABLE OF AUTHORITIES

Cases: Page

Anderson v. Whittaker Corp., 692 F. Supp. 764 (W.D. Mich. 1988), *aff'd in part, rev'd in part on other grounds*, 894 F.2d 804 (CA6 1990) 11

Barbe v. Drummond, 507 F.2d 794 (CA1 1974) 12

Calhoun v. Yamaha Motor Corp., U.S.A., 1993 WL 216238 (E.D. Pa., June 22, 1993) (unreported) ... 10, 22

Calhoun v. Yamaha Motor Corporaton, U.S.A., 40 F.3d 622 (CA3 1994) 1

Cantore v. Blue Lagoon Water Sports, Inc., 799 F. Supp. 1151 (S.D. Fla. 1992) 11-12

Caraballo v. Autoridad de Los Puertos de Puerto Rico, 388 F. Supp. 308 (D.P.R. 1974) 3

Choat v. Kawasaki Motors Corp., 1994 WL 221417 (Ala., May 27, 1994) (unreported) 12

Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) 6

Conner v. Aerovox, Inc., 730 F.2d 835 (CA1 1984), *cert. denied*, 470 U.S. 1050 (1985) 16

East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986) 9, 16

Ellenwood v. Exxon Shipping, Inc., 984 F.2d 1270 (CA1), *cert. denied*, 113 S. Ct. 2987 (1993) 13

Estate of Fajardo v. Maersk Line Agency, Inc., 1988 WL 168532 (D. Md., Nov. 30, 1988) (unreported) 11, 22

Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972) 9

Favorito v. Pannell, 27 F.3d 716 (CA1 1994) 13

Foremost Insurance Co. v. Richardson, 457 U.S. 668 (1982) 8-9, 15, 21

TABLE OF AUTHORITIES—*(Continued)*

Cases: Page

Gillespie v. United States Steel Corp., 379 U.S. 148 (1964) 2

Gilmore v. Witschorek, 411 F. Supp. 491 (E.D. Ill. 1976) 11

Greene v. Vantage S.S. Corp., 466 F.2d 159 (CA4 1972)... 12

Hanover Star Milling Co. v. Metcalf, 240 U.S. 403 (1916) 2

Kelly v. Panama Canal Com'n, 26 F.3d 597 (CA5 1994).. 11

Lipworth v. Kawasaki Motors Corp., U.S.A., 592 So. 2d 1151 (Fla. Dist. Ct. App.), *cert. denied*, 113 S. Ct. 465 (1992) 12

Lyon v. Ranger III, 858 F.2d 22 (CA1 1988) 13

Marastro Compania Naviera S.A. v. Canadian Maritime Carriers, Ltd., 959 F.2d 49 (CA5 1992) 16

Marine Transportation Services Sea-Barge Group v. Python High Performance Marine Corp., 16 F.3d 1133 (CA11 1994) 13

Miles v. Apex Marine Corp., 498 U.S. 19 (1990) ... 9, 19, 21-22

Miller v. American President Lines, Ltd., 989 F.2d 1450 (CA6 1993) 22

Mink v. Genmar Indus., Inc., 29 F.3d 1543 (CA11 1994).. 12

Mobil Oil v. Higginbotham, 436 U.S. 618 (1978) 17

Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970) ..... *passim*

Off-Shore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986) 6, 12, 18-19

Pope & Talbot, Inc. v. Hawn, 346 U.S. 906 (1953) 12

Romero v. International Terminal Operating Co., 358 U.S. 354 (1959) 9, 16

Sea-Land Services Inc. v. Gaudet, 414 U.S. 573 (1979)... 17

TABLE OF AUTHORITIES—*(Continued)*

Cases: Page

Sisson v. Ruby, 497 U.S. 358 (1990) 9, 14-15, 21

Sistrunk v. Circle Bar Drilling Co., 770 F.2d 455 (CA5 1985), *cert. denied*, 475 U.S. 1019 (1986) 22

Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917) 16

Spiller v. Thomas M. Lowe, Jr. & Assocs., Inc., 466 F.2d 903 (CA8 1972) 11

St. Hilaire Moye v. Henderson, 496 F.2d 973 (CA8), *cert. denied*, 419 U.S. 884 (1974) 12

Sutton v. Earles, 26 F.3d 903 (CA9 1994) 11, 22

Texaco Ref. & Mktg., Inc. v. Estate of Dau Van Tran, 777 S.W.2d 783 (Tex. Ct. App. 1989), *vacated*, 497 U.S. 1020, *on remand*, 795 S.W.2d 870 (Tex. Ct. App. 1990), *rev'd*, 808 S.W.2d 61 (Tex.), *cert. denied*, 502 U.S. 908 (1991) ..... *passim*

The Lottawanna, 21 Wall. (88 U.S.) 558 (1874) 8, 14

Truehart v. Blandon, 672 F. Supp. 929 (E.D. La. 1987) 11, 22

United States v. General Motors Corp., 323 U.S. 373 (1945) 2

Wahlstrom v. Kawasaki Heavy Industries, Ltd., 4 F.3d 1084 (CA2 1993), *cert. denied*, 114 S. Ct. 1016 (1994) 6, 9-11, 22

Walker v. Braus, 995 F.2d 77 (CA5 1993) 11

Constitutional Provision:

U.S. Const. art. III, § 2 3

Statutes and Regulations:

Fed. R. App. P. 5(a) 5

42 Pa. Cons. Stat. Ann. § 8301 (1982 & Supp. 1994) 4

TABLE OF AUTHORITIES—*(Continued)*

Statutes and Regulations: Page

42 Pa. Cons. Stat. Ann. § 8302 (1982 & Supp. 1994) 4

28 U.S.C. § 1254(1)..... 2

28 U.S.C. § 1292(b)..... 2, 5

28 U.S.C. § 1332 4

28 U.S.C. § 1333..... 3, 13

33 U.S.C. § 901, *et seq* 7

33 U.S.C. 905(b) 7

45 U.S.C. § 1, *et seq* 7

46 U.S.C. § 688 7

46 U.S.C. § 761-68..... 7

46 U.S.C.A. § 763a (Supp. 1993) 12

46 U.S.C. § 6102 20

48 U.S.C. § 749..... 3

33 C.F.R., Ch. 1, § 2.05-5(a) (1988) 3

Other Authorities:

Boating Statistics 1993, The 35th Annual Report..... 20

T. Schoenbaum, *Admiralty and Maritime Law*, § 8-3 (2d ed. 1994)..... 8, 16

14 Wright, Miller & Cooper, *Federal Practice and Procedure*, § 3672 (1994)..... 17, 19

No.____

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1994

YAMAHA MOTOR CORPORATION, U.S.A. and
YAMAHA MOTOR COMPANY, LTD.,
Petitioners

v.

LUCIEN B. CALHOUN and ROBIN L. CALHOUN,
Individually and as Administrators of the
Estate of Natalie K. Calhoun, Deceased,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

Yamaha Motor Corporation, U.S.A. and Yamaha Motor Company, Ltd. ("Yamaha") respectfully petition that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on November 2, 1994. Petitioners' request for rehearing with suggestion for rehearing in banc was denied on December 7, 1994.

OPINIONS BELOW

The opinion and judgment of the court of appeals (App. 1a and 44a), as amended (App. 47a), is reported at 40 F.3d 622 (CA3 1994). The court of appeals' order upon denial of a petition for rehearing with suggestion for rehearing in banc (App. 49a) is reported at 1994 U.S. App. LEXIS 34487 (CA3 Dec. 7, 1994). The memorandum opinion and orders of the district court below (App. 51a) are reported at 1993 WL

216238 (E.D. Pa., June 22, 1993).[1] The combined order denying Yamaha's motion for reconsideration and certifying the issue for immediate interlocutory appeal (App. 73a) is reported at 1993 U.S. Dist. LEXIS 9047, 1993 WL 197319 (E.D. Pa., June 2, 1993). The district court's order amending certification to include plaintiffs' questions (App. 78a) is reported at 1993 U.S. Dist. LEXIS 8267, 1993 WL 218833 (E.D. Pa., June 21, 1993). The court of appeal's orders granting permission for interlocutory appeal pursuant to Fed. R. App. P. 5(a) and consolidating the appeals are not reported, but are included in the appendix hereto at 84a.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1994 (App. 44a) and a timely petition for rehearing was denied on December 7, 1994. App. 49a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).[2]

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1. The district court opinion originally recited from the bench on December 24, 1992 was not formally issued by the court in written form until June 17, 1993.

2. The Supreme Court has jurisdiction to review interlocutory judgments of federal courts of appeal pursuant to 28 U.S.C. § 1254(1), and will do so particularly where there is an important and clear-cut issue of law that is fundamental to the further conduct of the case and would also otherwise qualify as a basis for certiorari. *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964); *United States v. General Motors Corp.*, 323 U.S. 373 (1945); *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403 (1916). A judgment rendered pursuant to the Interlocutory Appeals Act, 28 U.S.C. § 1292(b), already incorporates within the lower court standard some of the key criteria required by the Supreme Court in deciding whether to review such a judgment by virtue of the Act's reference to such factors as whether there is "a controlling question of law as to which there is substantial ground for difference of opinion" and the requirement for material advancement of "the ultimate termination of the litigation."

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

U.S. Const. art. III, § 2:

The judicial power shall extend . . . to all Cases of admiralty and maritime jurisdiction. . . .

28 U.S.C. § 1333:

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil cases of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

STATEMENT OF THE CASE

I. Factual Background

On July 6, 1989, Natalie Calhoun, the 12-year-old daughter of respondents Lucien B. and Robin L. Calhoun, was killed when the rented personal watercraft she was operating collided with a vessel anchored in navigable territorial waters off the coast of Puerto Rico.[3] The personal watercraft was a "WaveJammer" model manufactured by Yamaha Motor Company, Ltd. and distributed by Yamaha Motor Corporation, U.S.A. Although they presumably incurred funeral expenses, the Calhouns have not alleged they were in any way financially dependent on their daughter.

Mr. and Mrs. Calhoun, individually and in their capacities as administrators of their daughter's estate, sued Yamaha in the United States District Court for the Eastern District of

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3. "Territorial seas," with respect to the United States, are defined as "the waters within the belt, three (3) nautical miles wide adjacent to its coast and seaward of the territorial sea baseline." 33 C.F.R., Ch. 1, § 2.05-5(a) (1988). United States maritime law will be applied to territorial waters surrounding Puerto Rico since by virtue of the Federal Regulations Act, 48 U.S.C. § 749, Congress placed under the control of the Commonwealth of Puerto Rico its harbor areas and navigable bodies of water. In that same statute, it is stated that all laws of the United States for the protection and improvement of navigable waters of the United States and the preservation of navigation and commerce shall apply to Puerto Rico and its waters. *Caraballo v. Autoridad de Los Puertos de Puerto Rico,* 388 F. Supp. 308 (D.P.R. 1974).

Pennsylvania[4] seeking recovery under the Pennsylvania wrongful death[5] and survival[6] statutes. Federal jurisdiction was founded on both diversity of citizenship[7] and admiralty.[8] The Calhouns have alleged theories of negligence, strict liability, and breach of implied warranties, and seek recovery for damages including lost future earnings, loss of society, loss of support and services, funeral expenses and punitive damages.

II. Proceedings Below

On November 27, 1991, Yamaha moved for partial summary judgment, asserting that damages recoverable, if any, were to be determined under the federal general maritime cause of action announced by this Court in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), rather than the Pennsylvania remedial statutes referenced above. Because the accident in question occurred on navigable waters and resulted from traditional maritime activity, and since the facts of this case did not bring it within the parameters of any of the maritime statutory remedies, Yamaha argued that all relevant matters must therefore be decided pursuant to the federal common law of admiralty. Yamaha further asserted that the measure of damages recoverable, if any, must also be determined in accordance with recognized principles of general maritime law, and that under those principles plaintiffs were not entitled to recover lost future wages, loss of society or punitive damages. In its decision on Yamaha's motion, the district court below held that (1) the federal common law of admiralty governed the Calhouns' wrongful death and survival claims;[9] (2) the general maritime death action, announced in *Moragne,* displaced Pennsylvania wrongful death and survival

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4. Lucien and Robin Calhoun are residents of the Commonwealth of Pennsylvania. Natalie Calhoun's estate is also being administered in Pennsylvania.

5. 42 Pa. Cons. Stat. Ann. § 8301 (1982 & Supp. 1994).

6. 42 Pa. Cons. Stat. Ann. § 8302 (1982 & Supp. 1994).

7. 28 U.S.C. § 1332 (1993).

8. 28 U.S.C. § 1333 (1993).

9. *See* March 19, 1992 district court order granting summary judgment to the extent plaintiffs' claims are to be determined under the law of admiralty. App. 51a.

statutes;[10] and (3) under this federal maritime common law remedy, lost future wages and punitive damages could not be awarded, but loss of society and loss of support and services were compensable.[11]

After rejecting Yamaha's motion for reconsideration, the district court agreed to certify the question of whether loss of society was a proper element of damages under the general maritime death action to the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. § 1292(b). App. 73a. The Calhouns then requested that the district court amend its certification order to add the questions of whether future wage loss and punitive damages were recoverable. The district court agreed and certified the following questions to the court of appeals (App. 78a):

> The questions of law certified to the Court of Appeals are whether, pursuant to [a federal] maritime cause of action, plaintiffs may seek to recover (1) damages for the loss of the society of their deceased minor child, (2) damages for the loss of their child's future earnings, and (3) punitive damages.

By order dated July 16, 1993 and pursuant to Fed. R. App. P. 5(a), the court of appeals granted permission for interlocutory appeal on these related issues. App. 84a. The appeals were consolidated, briefs submitted and oral argument took place on April 13, 1994 before Judges Becker, Mansmann and Scirica. The panel's opinion and judgment were issued on November 2, 1994. App. 1a and 44a.

The district court's statement of certification involved the measure of damages recoverable in a federal maritime death action. On appeal, however, the Third Circuit decided the answers to the certified questions were contingent upon a reexamination of the premise underlying the district court's

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10. *See* December 29, 1992 district court order and bench opinion (recited December 24, 1992 and issued by the court on June 17, 1993). App. 65a-66a.

11. *See* December 29, 1992 district court order and bench opinion (recited December 24, 1992 and issued by the court on June 17, 1993). App. 67a, 71a and 72a.

decision, i.e., that the right of action recognized in *Moragne* and its progeny governs the case of a recreational boater killed in territorial waters to the exclusion of state law. Since the court of appeals concluded that the *Moragne* remedy did not apply to such cases, the questions originally certified by the district court were never reached. App. 4a. Instead, having dismissed the *Moragne* remedy, the court of appeals held there was no body of federal law applicable to the death of a recreational boater in territorial waters, and that state law should therefore apply. App. 4a. The Third Circuit based its decision primarily on the preemption analysis articulated in *Clearfield Trust Co. v. United States,* 318 U.S. 363 (1943), and its progeny (App. 9a), and also relied heavily upon its interpretation of *Off-Shore Logistics, Inc. v. Tallentire,* 477 U.S. 207 (1986), notably the discussion of Section 7 of the Death on the High Seas Act, for its holding that Congress affirmatively intended to preserve state remedies for maritime deaths which occur within territorial waters. App. 37a and 38a.

Accordingly, the district court order granting Yamaha partial summary judgment and precluding recovery for lost future wages and punitive damages was reversed, and the order denying partial summary judgment and permitting loss of society damages was affirmed. App. 4a and 43a. The case was remanded to the district court for further proceedings, including a preliminary determination of whether plaintiffs' claims should be governed by the law of Pennsylvania or Puerto Rico. App. 4a and 42a.

REASONS FOR GRANTING THE PETITION

Petitioners seek review by this Court because the decision of the court of appeals is in direct conflict with the recent Second Circuit decision in *Wahlstrom v. Kawasaki Heavy Industries, Ltd.,* 4 F.3d 1084 (CA2 1993), *cert. denied,* 114 S. Ct. 1016 (1994), as well as previous decisions of the Fifth, Sixth, Eighth and Ninth Circuit Courts of Appeal. The decision is also inconsistent with both the express holdings and the implied intent of the decisions of this Court in the quarter century since *Moragne.*

The need for further guidance from this Court is great. The implications of this case are far-reaching, involving actual and potential litigants in both commercial and recreational maritime settings. Unless the decision of the court of appeals is reviewed, litigants in substantially similar maritime cases across the country will be exposed to distinct and conflicting laws involving issues of national significance. Actions in the Second, Fifth, Sixth, Eighth and Ninth Circuits will proceed under *Moragne* and federal maritime common law. Courts within the Third Circuit will allow recovery to the degree permissible under the laws of Pennsylvania, New Jersey, Delaware or the U.S. Virgin Islands. The courts of the other circuits will presumably be free to choose between the two rules. The impact of this conflict on the fundamental concept of maritime uniformity is both obvious and acute.

I. The Decision Of The Court Of Appeals Is In Conflict With Decisions In The Second, Fifth, Sixth, Eighth And Ninth Circuits.

In *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), this Court announced the creation of a federal maritime right of action for deaths occurring in the nation's territorial waters. Although the specific facts of *Moragne* involved the death of a longshoreman allegedly due to an unseaworthy vessel, the decision was broader, establishing a general remedy for maritime wrongful death in territorial waters.

Since federal maritime legislation is by its terms inapplicable to nonseamen killed in territorial waters,[12] recovery prior to *Moragne* had depended on whether and the degree to

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12. The Death on the High Seas Act ("DOHSA"), 46 U.S.C. § 761-68, provides a remedy for civilian deaths that occur at sea more than a marine league (three nautical miles or 3.45 land miles) from the shore of any state, district, territory or dependency of the United States. The Merchant Marine Act of 1920 (also known as the "Jones Act"), 46 U.S.C. § 688, extends to seamen the protections of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 1, *et seq.* In 1927, Congress passed the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901, *et seq.*, which granted longshoremen and harbor workers the right to receive workers' compensation benefits from their employers for accidental injury or death arising out of their employment. Congress amended the LHWCA in 1972, revoking the longshoremen's right to bring an action for unseaworthi-

which the law of the state adjacent to the accident recognized an action for maritime wrongful death. The potential therefore existed for as many different remedies as there would be states addressing deaths on their territorial waters. In order to eliminate this disparity, the *Moragne* Court announced a uniform national remedy that was intended to supplant application of individual state laws:

> Our recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts. Such uniformity not only will further the concerns of both the 1920 Acts [referring to DOHSA and the Jones Act] but will also give effect to the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with and operating uniformly in, the whole country.' *The Lottawanna,* 21 Wall. 558, 575 (1874).

Id., 398 U.S. at 401-02 (citations and footnote omitted).[13]

Moragne did not involve the death of a recreational boater. However, in the quarter century since it was decided, the Supreme Court has steadily and unequivocally expanded the realm of maritime common law to encompass recreational boating. In *Foremost Insurance Co. v. Richardson,* 457 U.S. 668 (1982), this Court held that an accident between two recreational vessels on navigable territorial waters bears sufficient relationship to traditional maritime activity to fall within the scope of federal admiralty jurisdiction. *Id.* at 669. In *Sisson v. Ruby,* 497 U.S. 358 (1990), this Court similarly determined

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NOTES *(Continued)*

ness, but permitting a statutory cause of action for negligence against a vessel, including a remedy for wrongful death. 33 U.S.C. 905(b).

13. Thomas Schoenbaum also acknowledges federal preemption of state law remedies in his authoritative treatise. *Admiralty and Maritime Law,* § 8-3 (2d ed. 1994). Discussing the effect of the *Moragne* wrongful death action and referencing the above-quoted portion of the opinion, he states: "Thus the new *Moragne* wrongful death action preempts state wrongful [death] statutes within the area of admiralty jurisdiction." *Id.* at 742 (*citations omitted*).

that a case involving a fire on board a vessel docked at a marina is sufficiently related to traditional maritime activity to meet the requirements of admiralty jurisdiction. With the exercise of admiralty jurisdiction comes the application of the full body of substantive admiralty law. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 360 (1959); *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864 (1986) (*citing Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 254 (1972)).

It is of more than casual significance that there is not even one word of dicta in either the *Foremost* or the *Sisson* decisions to suggest the Court intended recreational boaters to be treated differently than any other maritime litigants. In both cases the Supreme Court held that federal admiralty jurisdiction would apply, thus invoking substantive maritime law, which at that time clearly encompassed the *Moragne* general wrongful death action. Moreover, in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), this Court expressly declined to limit *Moragne* to its specific facts, holding instead that any maritime injury not specifically covered under the federal statutes would fall within the general federal maritime remedy. This Court also explained that, in the context of *Miles*, the *Moragne* decision extended the DOHSA wrongful death remedy to territorial waters (*Id.*, 498 U.S. at 29) and that such extension "will further, rather than hinder, 'uniformity in the exercise of maritime jurisdiction'" *Id.* at 29 (*citing Moragne*, 398 U.S. at 396 n.12).

It was against this backdrop that the Third Circuit reached its decision in this case and the United States Court of Appeals for the Second Circuit decided *Wahlstrom v. Kawasaki Heavy Industries, Ltd.*, 4 F.3d 1084 (CA2 1993), *cert. denied*, 114 S. Ct. 1016 (1994), an action factually and legally indistinguishable from the case at bar. Scott Wahlstrom was killed when his rented Kawasaki brand personal watercraft collided with a 20-foot powerboat on the Thames River, a navigable waterway located in Connecticut. The decedent's parents sued Kawasaki under the Connecticut Products Liability Act and the Connecticut Unfair Trade Practices Act, basing federal jurisdiction on diversity of citizenship and seeking

compensatory damages, punitive damages and attorneys' fees. Kawasaki moved for summary judgment, arguing that the action was governed solely by federal maritime law. The district court granted Kawasaki's motion, dismissing the plaintiffs' state law claims. On appeal, the Wahlstroms conceded that the case fell within the admiralty jurisdiction of the federal courts, but argued that federal maritime law did not preclude application of individual state wrongful death statutes, and thus that Connecticut products liability and wrongful death laws should govern their action. In the alternative, the Wahlstroms argued that if the court found federal maritime law governed, the court should look to the Connecticut wrongful death provisions in fashioning the federal remedy. The Second Circuit rejected both of these assertions. Recognizing the importance of uniformity in maritime law, the Second Circuit held that the wrongful death cause of action under the general maritime law necessarily excludes the peculiarities of individual state remedial statutes. *Id.* at 1089.

Premising its holding on Supreme Court precedent, "which over the past thirty-three years [sic], has transformed the face of the federal maritime wrongful death remedy," the Second Circuit held that federal maritime law, whether or not in conflict with an individual state's law, precludes application of state law and governs all actions for wrongful death and survival occurring in navigable territorial waters falling under the admiralty jurisdiction of the federal courts. *Id.* at 1087-89. Having reached opposite conclusions on this important issue of maritime law, the Second and Third Circuits are thus in direct conflict.[14] And, since this Court has already denied cer-

14. The Third Circuit panel which issued the *Calhoun* opinion was well aware of the *Wahlstrom* opinion at the time it was considering these matters. While the *Calhoun* opinion does not discuss the Second Circuit's decision in detail, the court of appeals was clearly aware of the Second Circuit's position as well as contrary decisions in other circuits and district courts. App. 31, 25 and 40 n.42. The transcript of the oral argument also reveals direct recognition by the court of appeals of the contrary holding by the Second Circuit and the potential for this case to be argued before the Supreme Court. App. 90a and 100a.

tiorari in the *Wahlstrom* case, it is even more imperative that this petition be granted in order to avoid further conflict and confusion.

The decision of the court of appeals also conflicts with the decisions of other circuits in cases which, while not factually as similar as *Wahlstrom*, are nevertheless legally indistinguishable. *See, e.g., Walker v. Braus*, 995 F.2d 77 (CA5 1993) (recreational boating collision on state inland waterway, federal maritime law will determine recovery for wrongful death); *Kelly v. Panama Canal Com'n*, 26 F.3d 597 (CA5 1994) (recreational boating accident on Panama Canal, general maritime law will apply to death claim); *Anderson v. Whittaker Corp.*, 692 F. Supp. 764 (W.D. Mich. 1988) (recreational boat capsized in Lake Michigan, survivors' claims to be determined under federal maritime law, not state law), *aff'd in part, rev'd in part on other grounds*, 894 F.2d 804 (CA6 1990); *Spiller v. Thomas M. Lowe, Jr. & Assocs., Inc.*, 466 F.2d 903 (CA8 1972) (survey boat capsized on Red River in Arkansas, court recognized general maritime death action, not state remedial statutes); *Sutton v. Earles*, 26 F.3d 903 (CA9 1994) (collision between pleasure boat and Navy buoy, applicable substantive law for death actions is general maritime law).[15] *See also*

15. In addition to the courts of appeal noted above, numerous federal district and state supreme courts have also held that federal maritime law will displace state law in the civilian/recreational maritime death context. *See, e.g., Gilmore v. Witschorek*, 411 F. Supp. 491 (E.D. Ill. 1976) (pleasure boat collision on navigable waters, *Moragne* overruled longstanding doctrine of applying state wrongful death statutes to maritime claims); *Truehart v. Blandon*, 672 F. Supp. 929 (E.D. La. 1987) (pleasure boat collision with bridge results in death, general maritime death action precludes state remedial statutes in territorial waters); *Estate of Fajardo v. Maersk Line Agency, Inc.*, 1988 WL 168532 (D. Md., Nov. 30, 1988) (unreported) (drowning death of minor child caused by passing ship's wake, claim determined under federal maritime law, not state law); *Texaco Ref. & Mktg., Inc. v. Estate of Dau Van Tran*, 808 S.W.2d 61 (Tex.) (civilian crushed to death between boat and dock, general maritime law preempts state causes of actions and remedies consistent with longstanding desire of Congress and judiciary to achieve uniformity in exercise of admiralty jurisdiction and pursuant to United States Constitution), *cert. denied*, 502 U.S. 908 (1991); *Cantore v. Blue Lagoon Water Sports, Inc.*, 799 F. Supp. 1151 (S.D. Fla. 1992) (death resulting from collision between two personal watercraft, federal maritime law,

Barbe v. Drummond, 507 F.2d 794 (CA1 1974) (DOHSA action involving recreational boat, court recognized federal maritime survival action analogous to *Moragne* wrongful death action); *Greene v. Vantage S.S. Corp.,* 466 F.2d 159 (CA4 1972) (general federal maritime law applies to death of longshoreman on territorial waters); *St. Hilaire Moye v. Henderson,* 496 F.2d 973 (CA8), *cert. denied,* 419 U.S. 884 (1974) (recreational boat accident on Arkansas River, federal maritime law preempts application of state law); *Mink v. Genmar Industries, Inc.,* 29 F.3d 1543 (CA11 1994) (maritime recreational injury case comes within admiralty jurisdiction, substantive federal maritime law applies, including uniform three-year statute of limitations for maritime torts, 46 U.S.C.A. § 763a (Supp. 1993)).

In its opinion, the Third Circuit cited what it perceived as a split of authority among the circuits on the question of federal maritime displacement of state laws. App. 35a n.37. Even if this statement were correct, which Yamaha disputes, it would simply reinforce the need for certiorari to be granted herein. However, when the citations referenced by the court of appeals are examined, it is clear they do not support the position for which they are advanced, and in reality the *Calhoun* decision stands alone.

The court of appeals cited the First Circuit decision in *Lyon v. Ranger III,* 858 F.2d 22 (CA1 1988) (Breyer, J.), for the proposition that state statutes apply to maritime wrongful death actions where recreational boaters are killed in territo-

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NOTES *(Continued)*

not state remedial statutes, controls); *Lipworth v. Kawasaki Motors Corp., U.S.A.,* 592 So. 2d 1151 (Fla. Dist. Ct. App..) (federal maritime law, not state law, applies to "jet ski" collision death), *cert. denied,* 113 S. Ct. 465 (1992); *Choat v. Kawasaki Motors Corp.,* 1994 WL 221417 (Ala., May 27, 1994) (unreported) (swimmer killed by "jet ski" on navigable waters, with admiralty jurisdiction comes application of substantive maritime law.

The precedential impact of these cases is not insignificant. As the Court is no doubt aware, in maritime cases state courts and district courts hearing cases in diversity are required to apply substantive admiralty law. *Off-Shore Logistics, Inc. v. Tallentire,* 477 U.S. 207 (1986); *Pope & Talbot, Inc. v. Hawn,* 346 U.S. 906 (1953).

rial waters. App. 35a n.37 and 39a. With all due respect to the court below, this citation is plainly and simply wrong. As the opinion unequivocally notes, "*Lyon's* . . . estate brought this wrongful death action *under the general maritime law*, 28 U.S.C. § 1333 (1982); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 397-403, 90 S.Ct. 1772, 1785-89, 26 L.Ed.2d 339 (1970)." *Lyon*, 858 F.2d at 24 (*emphasis added*). Contrary to the assumption of the court below, *Lyon* was not decided under the Massachusetts wrongful death and survival statutes. Rather, *Lyon* was in fact a *Moragne* action, and the court looked to Massachusetts law only to decide whether the negligence of one party should be imputed to another. Moreover, even on this relatively minor point, the court applied Massachusetts law only after determining: (1) there was no conflicting federal law on point; and (2) Massachusetts law was generally consistent with nationwide jurisprudence on this issue. Applying a widely recognized common law tort concept to a maritime case in the absence of conflicting federal law, as was done in *Lyon*, is a far cry from the *Calhoun* court's utilization of an entire state compensation system to the exclusion of the uniform federal remedy.

The other cases cited in support by the court of appeals are equally unpersuasive. *Ellenwood v. Exxon Shipping, Inc.*, 984 F.2d 1270 (CA1), *cert. denied*, 113 S. Ct. 2987 (1993), involved a claim for employment discrimination, not death. Moreover, while applying state law in that case, the *Ellenwood* court specifically recognized the displacement of state law in the wrongful death context in light of the *Moragne* decision. *Ellenwood*, 984 F.2d at 1280. *Favorito v. Pannell*, 27 F.3d 716 (CA1 1994), was an action for personal injuries, not death, and *Marine Transportation Services Sea-Barge Group v. Python High Performance Marine Corp.*, 16 F.3d 1133 (CA11 1994), was a commercial action involving lost property.

As *Moragne* and the subsequent cases that have applied and interpreted it make clear, admiralty wrongful death claims arising within territorial waters are not decided under state law. Rather, where no federal statute is specifically applicable, the remedy is to be determined under a uniform system of federal common law, regardless of who is killed or where the

accident takes place. This result is not only consistent with the general policy of DOHSA and the Jones Act, but also effectuates "the constitutionally based principle that federal admiralty law should be a 'system of law co-extensive with, and operating uniformly in, the whole country.'" *Moragne*, 398 U.S. at 402 (*quoting The Lottawanna*, 21 Wall. (88 U.S.) 558, 575 (1874)).

II. The Decision Of The Court Of Appeals Is Inconsistent With Both Express Holdings And The Intent Of This Court.

Because the precise issues raised in this petition have never been the subject of a direct opinion of this Court, the decision of the court of appeals cannot be said to be contrary to a specific Supreme Court decision. That is not to say, however, that this Court has never offered its guidance. In *Texaco Refining & Marketing, Inc. v. Estate of Dau Van Tran*, 777 S.W.2d 783 (Tex. Ct. App. 1989), an intermediate appellate court affirmed the decision of a Texas trial court to apply the Texas wrongful death and survival statutes to an action brought by the survivors of a civilian killed in territorial waters. This Court granted certiorari and, upon review, vacated and remanded the case to the Texas appellate court for review in light of *Sisson v. Ruby*, 497 U.S. 358 (1990), which applied federal maritime law to a case involving a fire on board a docked vessel.[16] Despite the specific direction of this Court, the Texas appellate court reaffirmed its earlier decision applying state law. 795 S.W.2d 870 (Tex. Ct. App. 1990). The Texas Supreme Court reversed this decision, however, holding not only that state law is preempted by federal maritime law, but that the failure to award damages consistent with maritime law is reversible error. 808 S.W.2d 61 (Tex. 1991). This Court then denied certiorari following the Texas Supreme Court's decision. 502 U.S. 908 (1991).

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16. *Texaco Ref. & Mktg., Inc. v. Estate of Dau Van Tran*, 777 S.W.2d 783 (Tex. Ct. App. 1989), *vacated*, 497 U.S. 1020, *on remand*, 795 S.W.2d 870 (Tex. Ct. App. 1990), *rev'd*, 808 S.W.2d 61 (Tex.), *cert. denied*, 502 U.S. 908 (1991).

In *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), this Court announced the creation of a federal death remedy applicable in the absence of a relevant federal maritime statute. *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982), and *Sisson v. Ruby*, 497 U.S. 358 (1990), confirmed and reaffirmed that recreational boating is within the ambit of federal maritime jurisdiction. In *Texaco Refining & Marketing, Inc. v. Dau Van Tran*, 497 U.S. 1020 (1990), this Court vacated a decision of a Texas appellate court which had applied state law to a civilian death and remanded the case after specifically instructing the Texas court to reconsider its decision in light of *Sisson*. The decision of the Third Circuit in this case is plainly inconsistent with the intent of this line of Supreme Court authority, and is unsupported by any decision to the contrary. Moreover, the decision has even broader implications than its apparent rejection of *Moragne* in the context of civilian deaths on navigable, territorial waters. It represents a complete rejection of the precepts of this Court set forth in *Foremost* and *Sisson*, which recognized that recreational boating is within the ambit of maritime jurisdiction.

III. The Court Of Appeals' Decision Undermines The Fundamental Concept Of Maritime Uniformity.

In its opinion, the Third Circuit downplayed the importance of uniformity in maritime jurisprudence, stating that "although the cases often mention uniformity as a guiding principle, the Court's actions belie its importance. . . . We believe that the thrust of these cases suggests that the concept of uniformity has a good deal less weight than has been thought. . . ." (*citations and footnote omitted*). App. 26a-27a. However, the fact that admiralty jurisprudence has not yet successfully crafted a fully uniform and internally consistent system of maritime law for deaths which occur in territorial waters does not mean that the stated goal of uniformity is unimportant. Rather, it simply indicates that the goal has not yet been attained.

The recurrent theme of *Moragne* and the subsequent decisions interpreting it is that each and every party who brings an action for a maritime wrongful death should receive essentially the same substantive remedy. Regardless of

whether the decedent is a civilian or a seaman, whether the death occurs within territorial waters or on the high seas, or whether the claim is based on theories of negligence or unseaworthiness, each petitioner should receive similar redress from the courts. The Third Circuit's decision in the instant case is directly contrary to the prevailing current of maritime jurisprudence.

Uniformity in admiralty jurisdiction has its roots in Article III, Section 2 of the Constitution, wherein the federal judiciary was given admiralty and maritime jurisdiction. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 360-61 (1959). The necessity of a uniform national approach to the exercise of this jurisdiction has been a pervasive theme of the decisions of this Court on the subject, beginning with *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917). In *Jensen*, the Court was asked to decide whether the application of the New York Workmen's Compensation Act to a case involving the death of a longshoreman in territorial waters was an unconstitutional intrusion on federal admiralty jurisdiction. The Court concluded this was indeed the case. *Jensen* established the principle that federal admiralty law governs maritime occurrences and that state law must yield to the required uniformity of the maritime law. While the Court has also recognized that the general maritime law is not a complete system, and there are gaps to be filled by analogy to federal statutes and/or adoption of state law concepts,[17] the goal of uniformity in admiralty does require careful analysis and respect.

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17. In the maritime law preemption analysis, the federal courts most frequently "borrow" the general common law rather than the law of any particular state because this promotes uniformity in the general maritime law. T. Schoenbaum, *Admiralty and Maritime Law*, § 4-4, p. 143 (2d ed. 1994) (*citing Marastro Compania Naviera S.A. v. Canadian Maritime Carriers, Ltd.*, 959 F.2d 49 (CA5 1992); *Connor v. Aerovox, Inc.*, 730 F.2d 835 (CA1 1984), *cert. denied*, 470 U.S. 1050 (1985); *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986)).

As the district court below recognized, the evolution of maritime wrongful death law since *Moragne* has been toward a uniform cause of action, national in scope.

> If Professors Wright, Miller and Cooper[18] are correct [in stating that state wrongful death statutes will apply where maritime accidents fall within a marine league from shore] — and they almost always are — the plaintiffs in the case before this court would seem to have substantial ammunition in contending for the proposition that at least some categories of nonpecuniary damages can be asserted either under a wrongful death statute or a survival statute. The thrust, nonetheless, of the post-*Gaudet* cases, including *Tallentire,* seems to me to run not in direct holding but in jurisprudential approach contrary to the inference drawn by Professors Wright, Miller and Cooper. That is to say, the Supreme Court's post-*Gaudet* jurisprudence seems to me cumulatively to run against a conclusion that state statutes can of their own force have some share in defining what a cause of action may be which arises from a death in the navigable waters, whether on the high seas or on the territorial water, and without regard to whether the decedent is a seaman or a longshoreman on the one hand or a civilian on the other.
>
> * * *
>
> What I think is clear from Justice Stevens' identification of the two "national rules" [referring to *Mobil Oil v. Higginbotham,* 436 U.S. 618, 624 n.18 (1978)] is that the Court saw not merely the DOHSA claim but the *Gaudet* claim . . . as claims of national architecture . . . To that extent, I think *Mobil Oil* carried on what was essentially the central logic of *Moragne* and *Gaudet* themselves — the understanding that the Supreme Court was authorizing the creation of a federally judicially defined cause of action, one which possibly would draw on state law sources but not because state law sources held any direct primacy.

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18. 14 Wright, Miller & Cooper, *Federal Practice and Procedure,* § 3672, at 155 (1994).

* * *

> Justice O'Connor for the *Tallentire* majority [referring to 477 U.S. 207, 233] echoes Justice Stevens for the majority in *Mobil Oil* in recognizing that what is in balance is a national statutory claim on the high seas as against a national judicially created maritime action in the territorial waters.
>
> To recapitulate this portion of the opinion, my conclusion is that whatever recovery may be had for a death befalling someone who is not a seaman and not a longshoreman in territorial waters is dictated by a *national* and hence *uniform* federal maritime claim.

(Emphasis in original.) See December 24, 1992 District Court Bench Opinion, 1993 WL 216238 at ** 6-7 (unreported). App. 63a-65a.

Rejecting the district court's analysis, the court of appeals instead relied heavily upon a markedly different interpretation of *Off-Shore Logistics, Inc. v. Tallentire,* 477 U.S. 207 (1986), notably the discussion of Section 7 of the Death on the High Seas Act, for its holding that Congress affirmatively intended to preserve state remedies for maritime deaths which occur within territorial waters. The Third Circuit expressed concern that if DOHSA is to provide by example the measure of damages for death actions under maritime common law, then *Moragne* in essence would give DOHSA a preclusive effect over state law in territorial waters when Congress explicitly intended DOHSA to have no such effect. App. 38a.

Tallentire did not affirmatively hold that state remedies may be applied to accidents occurring in territorial waters. Rather, *Tallentire* held that the DOHSA remedy could not be supplemented by state law in cases involving deaths on the high seas. The opinion itself states that the "savings to suitors" clause of 28 U.S.C. § 1333 permits state courts to adjudicate maritime actions, but "the extent to which state law may be used to remedy maritime injuries is constrained by a so-called 'reverse-Erie' doctrine which requires that the substantive remedies afforded by States conform to governing federal maritime standards." *Tallentire,* 477 U.S. at 223. *Tallentire* does

not say that the federal courts lack authority to preempt state law in territorial waters. Quite to the contrary, this Court in *Miles v. Apex Marine,* 498 U.S. 19, 29 (1990), expressly construed *Moragne* in the context of that case as extending the provisions of DOHSA to territorial waters. *Tallentire* simply notes that Congress, at the time it enacted DOHSA, declined to do so.

It is significant that the court of appeals' *Tallentire* analysis, as well as its references to Wright, Miller and Cooper, *Federal Practice and Procedure* (App. 24a and 39a), have been strongly challenged — both by the court below in this case and in the series of cases identified as *Texaco Refining & Marketing, Inc. v. Estate of Dau Van Tran* (*see* n.16, *infra*) which were discussed previously in this petition. These very same arguments formed the basis for the second Texas Appellate Court decision wherein, even after being given specific direction by this Court, it reaffirmed its previous decision to apply state remedial statutes in place of the federal maritime remedy. Of course, this second decision by the appellate court was overturned by the Texas Supreme Court, after which this Court declined further review. If the Third Circuit's interpretation of *Tallentire* is correct, one would have expected the Supreme Court's treatment of *Dau Van Tran* to be precisely the opposite.

Evolution of the maritime common law death remedy is clearly an incremental process, and the simple fact that the journey is not complete does not authorize any court to disregard the steps which have already been taken. The court of appeals' decision threatens the established concept of maritime uniformity by directly interjecting individual state remedial statutes into the body of general maritime law rather than developing a uniform remedy, national in scope, for maritime wrongful death claims within territorial waters. If allowed to stand, this decision will plunge the courts back into the pre-*Moragne* jigsaw puzzle of disparate state law remedies.

IV. The Question Presented Is Important — The Decision Of The Third Circuit Will Have Immediate And Widespread Impact Beyond The Parameters Of This Case.

Petitioners and respondents are not the only parties affected by the Third Circuit's decision. The decision of the Third Circuit will have immediate and widespread impact on numerous recreational boaters nationwide, as well as on maritime commerce as the two activities interact within the nation's territorial waters. Under the authority of 46 U.S.C. § 6102, the Office of Navigation Safety & Waterway Services has been delegated the responsibility to collect, analyze and annually publish statistical information obtained from recreational boat casualty reporting systems. Within that office, the Auxiliary Boating and Consumer Affairs Division has Recreational Boating Safety Program responsibility. *Boating Statistics 1993, The 35th Annual Report*, contains the most recent, collated statistics on recreational boating accidents. The report is the result of the coordinated effort of the Coast Guard and those jurisdictions which have federally approved boat-numbering systems.[19]

In 1993, the Coast Guard received reports which reached a total of 6,335 recreational boating accidents, resulting in 800 fatalities and 3,559 injuries. In 1992, the Coast Guard received reports of 3,683 injuries and 816 fatalities involving recreational vessels. In 1991, those totals were 3,967 and 924, respectively. Although the annual number of recreational boating injuries and fatalities seem to be declining slightly, there are still a significant number of such occurrences per year. Each and every one of these incidents which results in a fatality may implicate the very same legal questions presented by this petition. So, too, may each incident in which a non-seaman is killed as a result of his or her interaction with a commercial vessel, whether as a passenger or otherwise. It is also likely, given the court of appeals' rejection of *Moragne* in the recreational death context, that it would also apply state

19. These include the District of Columbia, Puerto Rico, Guam, the Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands and all states except Alaska.

law in maritime cases involving personal injury and property damage within territorial waters. It is clear that the impact of the decision of the court of appeals goes far beyond the parties to this appeal.

DAMAGES RECOVERABLE IN A GENERAL MARITIME ACTION

In the event the Court elects to hear this case, petitioners also request the Court to consider the questions originally certified to the court of appeals, to wit, whether, pursuant to the general maritime death action, respondents may recover: (1) damages for loss of society; (2) damages for lost future earnings; and (3) punitive damages. The *Moragne* Court left open for future determination the question of what elements of damage would be available. Nevertheless, because a number of questions remain open or in conflict 25 years later, petitioners request the Court's further guidance.

Much or all of the uncertainty regarding the elements of recovery under the general maritime action could be removed by the Court with a simple pronouncement regarding the scope of *Moragne* and the decisions which have followed it. For example, although *Moragne* involved the death of a longshoreman, the overwhelming majority of subsequent decisions has applied its remedy to any maritime death action not covered by one of the federal statutory enactments. As stated at length above, petitioners believe this result is entirely consistent with the line of post-*Moragne* cases including *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982), *Sisson v. Ruby*, 497 U.S. 358 (1990), and *Texaco Refining & Marketing, Inc. v. Dau Van Tran*, 497 U.S. 1020 (1990). Nevertheless, since this Court has never specifically held that *Moragne* applies in the case of a civilian boater killed in territorial waters, the court of appeals found no direct constraint against the application of state law.

The absence of an unequivocal pronouncement from the Court has also created disparity even among those courts which have found *Moragne* to be applicable in similar cases. For example, in *Miles v. Apex Marine*, 498 U.S. 19 (1990), this Court determined that neither damages for loss of society nor

lost future wages was recoverable in an action for the death of a seaman. The *Wahlstrom* court and others have interpreted *Miles* to apply to any action for wrongful death in territorial waters, and precluded recovery of those damages. *See, e.g., Wahlstrom v. Kawasaki Heavy Indust., Ltd.*, 4 F.3d 1084 (CA2 1993), *cert. denied*, 114 S. Ct. 1016 (1994).[20] Other courts, however, have focused on the fact that the decedent in *Miles* was a seaman and have therefore declined to apply *Miles* to civilian actions. *See, e.g., Sutton v. Earles*, 26 F.3d 903 (CA9 1994). The district court in this case chose the middle road: it applied *Miles* to the question of lost future wages because that holding was consistent with the majority of state rules (*Calhoun v. Yamaha Motor Corp., U.S.A.*, 1993 WL 216238 at ** 6-7 (E.D. Pa., June 22, 1993) (unreported) (App. 66a-67a)), but rejected that aspect of *Miles* which precluded recovery for loss of society by distinguishing the *Miles* decedent as a seaman. *Id.*, 1993 WL 216238 at ** 7-9. App. 68a-71a.

The same issue can also be expected to arise in the context of punitive damages. Many courts (including the district court below) have recently interpreted *Miles* to disfavor nonpecuniary elements of damage such as punitive damages. *See, e.g., Wahlstrom v. Kawasaki Heavy Indust., Ltd.*, 4 F.3d 1084 (CA2 1993), *cert. denied*, 114 S. Ct. 1016 (1994); *Miller v. American President Lines, Ltd.*, 989 F.2d 1450 (CA6 1993); *Calhoun v. Yamaha Motor Corp., U.S.A.*, 1993 WL 216238 at ** 9 (E.D. Pa., June 22, 1993) (App. 72a). However, absent express direction from this Court, the potential for conflict remains.

Petitioners therefore request this Court to decide not only whether the *Moragne* action extends to civilian deaths, but also the degree, if any, to which a civilian *Moragne* claim differs from that involving a seaman or longshoreman.

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20. Other courts had reached the same conclusion prior to *Miles*. *See, e.g., Sistrunk v. Circle Bar Drilling Co.*, 770 F.2d 455 (CA5 1985), *cert. denied*, 475 U.S. 1019 (1986); *Estate of Fajardo v. Maersk Line Agency, Inc.*, 1988 WL 168532 (D. Md., Nov. 30, 1988) (unreported); *Truehart v. Blandon*, 672 F. Supp. 929 (E.D. La. 1987).

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 14, 1995

APPENDIX

TABLE OF CONTENTS

APPENDIX

Opinion of the United States Court of Appeals for the Third Circuit, Cross-Appeals Nos. 93-1736 and 1737 (3d Cir. Nov. 2, 1994) A-1

Judgment (Nov. 2, 1994) A-44

Order Amending Opinion (Nov. 17, 1994) A-46

Order Denying Petition for Rehearing With Suggestion for Rehearing In Banc (Dec. 7, 1994) A-49

Orders and Memorandum Opinion, U.S. District Court for the Eastern District of Pennsylvania, Civil Action No. 90-4295 (Mar. 19, 1992 and Dec. 29, 1992) (Bench Opinion recited Dec. 24, 1992 and issued by the court on June 17, 1993) A-51

Order and Memorandum Opinion Denying Motion for Reconsideration of District Court's December 29, 1992 Order and Granting Motion for Certification to the Court of Appeals Pursuant to 28 U.S.C.A. § 1292(b) (June 3, 1993) A-73

Order and Memorandum Opinion Amending District Court's June 3, 1993 Order for Certification to Include Questions Raised By Plaintiffs (June 21, 1993) A-78

Orders, Third Circuit Court of Appeals, granting Petition to Appeal Interlocutory Order pursuant to Fed.R.App.P. 5(a) and Consolidating Appeals (July 16, 1993) A-84

Stipulation to Dismiss Certain Defendants, approved by District Court (Feb. 12, 1991) A-86

Transcript of Oral Argument Before the Third Circuit Court of Appeals (April 13, 1994) A-88

Filed November 2, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 93-1736 and 93-1737

LUCIEN B. CALHOUN; ROBIN L. CALHOUN,
individually and as Administrators of the
Estate of Natalie K. Calhoun, deceased

v.

YAMAHA MOTOR CORPORATION, U.S.A.; YAMAHA MOTOR CO., LTD.; PALMAS DEL MAR COMPANY; PALMAS DEL MAR, INC.; PALMAS YACHT CLUB, INC.; MARINA DE PALMAS YACHT CLUB, INC.; MAXXAM PROPERTIES, INC.; ABC CORPORATION; XYZ PARTNERSHIP(S); CANDELERO HOTEL CORPORATION; MARINA DE PALMAS SHIPYARD, INC.

Yamaha Motor Corporation, U.S.A. and
Yamaha Motor Company, Ltd.,
Appellants in No. 93-1736

LUCIEN B. CALHOUN; ROBIN L. CALHOUN,
individually and as Administrators of the
Estate of Natalie K. Calhoun, deceased,

Appellants in No. 93-1737

v.

YAMAHA MOTOR CORPORATION, U.S.A.; YAMAHA MOTOR CO., LTD.; PALMAS DEL MAR COMPANY; PALMAS DEL MAR, INC.; PALMAS YACHT CLUB, INC.; MARINA DE PALMAS YACHT CLUB, INC.; MAXXAM PROPERTIES, INC.; ABC CORPORATION; XYZ PARTNERSHIP(S); CANDELERO HOTEL CORPORATION; MARINA DE PALMAS SHIPYARD, INC.

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civ. No. 90-04295)

Argued: April 13, 1994

Before: BECKER, MANSMANN and SCIRICA,
Circuit Judges.

(Filed November 2, 1994)

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OPINION OF THE COURT

BECKER, *Circuit Judge.*

These consolidated interlocutory cross appeals before us pursuant to 28 U.S.C. § 1292(b) (1993) present an interesting and important question of maritime law: whether state wrongful death and survival statutes are displaced by a federal maritime rule of decision concerning the remedies available for the death of a recreational boater occurring within state territorial waters,[1] which are explicitly excluded from the reach of the Death on the High Seas Act, 46 U.S.C.A. § 761 (1975). The remedies at issue are loss of society, loss of support and services, loss of future earnings, and punitive damages.

This case arose when Natalie Calhoun, the twelve year old daughter of plaintiffs Lucien and Robin Calhoun, was killed in a boating accident in the waters off Puerto Rico. Natalie had been riding a "Wavejammer," a type of jet ski manufactured by Yamaha Motor Corporation, U.S.A., and its parent company, Yamaha Motor Company, Ltd. (collectively referred to as "Yamaha"). Plaintiffs sued Yamaha seeking recovery under the Pennsylvania wrongful death and survival statutes, 42 PA. CONS. STAT. ANN. §§ 8301-8302 (1982 & Supp. 1994). In granting partial summary judgment for Yamaha on the issue of available damages, the district court held that federal maritime law displaced both state remedies, and fashioned a federal common law rule applicable to cases involving the death of a non-seaman in territorial waters under which future earnings and punitive damages are not recoverable but damages for loss of society or support are. Each party sought certification to appeal the portion of the court's ruling that was unfavorable.

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1. "State territorial waters" refers to waters within the territorial limits of a state, as well as "the coastal waters less than three nautical miles from the shore of a state." William C. Brown, III, *Problems Arising from the Intersection of Traditional Maritime Law and Aviation Death and Personal Injury Liability*, 68 TUL. L. REV. 577, 581 (1994).

We do not reach the question whether the district court fashioned the proper federal common law remedy, however, because we conclude that the federal maritime law does not displace state wrongful death or survival statutes in this context. Rather, applying traditional admiralty choice of law principles, we hold that the appropriate rule of decision in this area should be supplied by state law. Our analysis of the Supreme Court's maritime wrongful death jurisprudence reveals that there is no federal substantive policy with which state wrongful death or survival statutes conflict here. In the absence of a clear conflict, state law rules of decision should apply. We will therefore affirm the district court's order denying Yamaha partial summary judgment, reverse the order granting Yamaha partial summary judgment, and remand the case for further proceedings consistent with this opinion. On remand, the district court will have to determine whether the plaintiffs' claims are governed by the laws of Pennsylvania or of Puerto Rico, and how the wrongful death and survival laws of those Commonwealths bear upon plaintiffs' damages.

I. FACTS, PROCEDURAL HISTORY, AND SCOPE OF THE INTERLOCUTORY APPEAL

On July 6, 1989, while vacationing with her parents at Palmas Del Mar Resort, Humacao, Puerto Rico, Natalie Calhoun rented a Yamaha "Wavejammer." While she was riding the "Wavejammer," Natalie slammed into a vessel anchored in the waters off the hotel frontage and was killed. At the time of her death, Natalie was twelve years old. Her parents, Lucien and Robin Calhoun, individually and in their capacities as administrators for the estate of their daughter, sued Yamaha in the District Court for the Eastern District of Pennsylvania seeking recovery under the Pennsylvania wrongful death statute, 42 PA. CONS. STAT. ANN. § 8301 (1982 & Supp. 1994), and the Pennsylvania survival statute, 42 PA. CONS. STAT. ANN. § 8302 (1982). Their complaint invoked federal jurisdiction both on the basis of diversity of citizenship, 28 U.S.C.A. § 1332 (1993),[2] and

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2. The Calhouns are citizens of Pennsylvania; Yamaha Motor Corporation, U.S.A. is a California corporation, and Yamaha Motor Company, Ltd. is a Japanese corporation.

admiralty, 28 U.S.C.A. § 1333 (1993). The theories of recovery alleged in the complaint included negligence, strict liability, and breach of the implied warranties of merchantability and fitness for purpose. The complaint sought damages for lost future earnings, loss of society, loss of support and services, and funeral expenses. It also requested punitive damages.

On November 27, 1991, Yamaha moved for partial summary judgment asserting that the damages recoverable in the action, if any, were governed by the federal admiralty law, and that under that law the plaintiffs were not entitled to lost future wages, loss of society, loss of support and services, or punitive damages.[3] In its decision on the motion, the district court: (1) agreed with Yamaha that the federal common law of admiralty governed the Calhouns' wrongful death and survival actions; (2) held that the general maritime wrongful death cause of action recognized in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S. Ct. 1772 (1970), displaced the Pennsylvania wrongful death and survival statutes and hence that any available remedy was a function of federal common law; and (3) held that under this federal common law remedy, lost future wages and punitive damages could not be awarded but loss of society and loss of support and services could be. The court therefore granted Yamaha's motion for summary judgment on the loss of future earnings and punitive damages, and denied its motion respecting the claims for loss of society and loss of support and services.

Yamaha moved the district court to certify for immediate interlocutory appeal, 28 U.S.C.A. § 1292(b) (1993), the question whether the plaintiffs should be able to recover damages for the loss of Natalie's society. Believing that the question was extremely close, the district court granted the motion and certified the issue to this court.[4] Plaintiffs then

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3. Yamaha has conceded that funeral expenses are compensable.

4. Section 1292(b) allows for immediate appeal of interlocutory orders (1) which involve a controlling question of law as to which there is substantial ground for difference of opinion and where an immediate appeal will materially advance the ultimate termination of the litigation and (2) which the Court of Appeals permits pursuant to Rule 5 of the Federal Rules of Appellate Procedure. *See* 28 U.S.C.A. § 1292(b); FED. R. APP. P. 5(a).

requested that the district court amend its certification order to add the question whether future earnings and punitive damages were recoverable. The district court agreed, and certified the following question to this Court:

> The questions of law certified to the Court of Appeals are whether, pursuant to [a federal] maritime cause of action, plaintiffs may seek to recover (1) damages for the loss of the society of their deceased minor child, (2) damages for the loss of their child's future earnings, and (3) punitive damages.

Both parties petitioned for permission to appeal pursuant to Federal Rule of Appellate Procedure 5(a). We granted both petitions and consolidated the appeals. We have jurisdiction pursuant to 28 U.S.C.A. § 1292(b) (1993).

The district court's statement in the certification order is limited to the question of what damages are available under a *federal* maritime cause of action. On appeal, however, the parties have also (properly) briefed the question whether federal maritime law displaced state wrongful death and survival statutes. As will appear, the answer to the certified question depends in large part on the resolution of the displacement question. We presume that the district court intended this important question of displacement to be considered. But even if such were not the case, it would not affect our jurisdiction.

As provided in Section 1292(b), we have before us an appeal from the challenged order, not just the certified question. Section 1292(b) requires not that we answer the certified question, but that we decide an appeal from an interlocutory order. We therefore are not bound by the district court's formulation of the question, and may address any issue that is necessary to decide the appeal before us. *See In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir. 1986). There the district court certified for appeal an order certifying a compulsory class under Federal Rule of Civil Procedure 23(b)(1)(A) and (b)(1)(B), but after taking jurisdiction we also reviewed the court's denial of certification under Rule 23(b)(3). *Id.* at 1002. *See also Johnson v. Alldredge*, 488 F.2d 820, 822-23 (3d Cir. 1973) (stating that appeals court is not bound by district court's

statement of the issue on Section 1292(b) appeal), *cert. denied*, 419 U.S. 882, 95 S. Ct. 148 (1974); 9 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 110.25[1], at 300 (2d ed. 1994) ("[I]t is the *order* that is appealable, and not the controlling question identified by the district court. Thus, the court of appeals may address any issue necessary to decide the case before it.") (footnote omitted). The displacement question, which, in our view, is the critical question raised by this appeal, is therefore appropriately before us, and we turn immediately to it. The questions are ones of law and our review is plenary.

II. ADMIRALTY LAW AND DISPLACEMENT OF STATE LAW: GENERAL PRINCIPLES

As we have noted, the plaintiffs' complaint alleged federal jurisdiction on the basis of both diversity of citizenship, 28 U.S.C.A. § 1332 (1993), and admiralty, 28 U.S.C.A. § 1333 (1993).[5] The Supreme Court has instructed us that "[w]ith

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5. Since this accident involved the allision of a pleasure craft (the "Wavejammer") with another vessel on navigable waters, admiralty jurisdiction appears to have been appropriate. *See Sisson v. Ruby*, 497 U.S. 358, 110 S. Ct. 2892, 2898 (1990); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 677, 102 S. Ct. 2654, 2659 (1982) (collision of two boats, neither of which had ever been engaged in commercial maritime activity, and where site of accident was on waters seldom, if ever, used for commercial activity, was within admiralty jurisdiction). The Calhouns now argue that admiralty jurisdiction is inappropriate. Although they are entitled to so argue and have reserved their right to appeal that question from a final order, we doubt that the existence or non-existence of admiralty jurisdiction matters to the question of remedies. Even if this were solely a diversity case (in which event we would still have subject matter jurisdiction over these cross-appeals) or the parties were in state court, a federal maritime rule of decision applicable to the controversy would still displace a state rule that was in conflict. Although *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938), states that there is no *general* federal common law, it is well settled that there are areas in which *specific* bodies of federal common law operate, particularly admiralty. And where a federal rule (either statutory or common law) supplies a rule of decision in a particular case, it applies regardless of the basis of jurisdiction. That is in part what the reverse-*Erie* doctrine tells us. *See Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 223, 106 S. Ct. 2485, 2494 (1986).

admiralty jurisdiction comes the application of substantive admiralty law." *East River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858, 864, 106 S. Ct. 2295, 2298-99 (1986). But knowing that substantive admiralty law applies does not really resolve the question whether federal or state law provides the relevant rule of decision. "Although the corpus of admiralty law is federal in the sense that it derives from the implications of Article III evolved by the courts, to claim that all enforced rights pertaining to matters maritime are rooted in federal law is a destructive oversimplification of the highly intricate interplay of the States and the National Government." *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373-75, 79 S. Ct. 468, 480 (1959). *See also American Dredging Co. v. Miller*, 114 S. Ct. 981, 987 (1994) (recognizing the continued vitality of this principle from *Romero*).

State and federal authorities jointly exercise regulatory authority over maritime matters. *Romero*, 358 U.S. at 375, 79 S. Ct. at 481. As a result, state law can, and often does, provide the relevant rule of decision in admiralty cases. *See, e.g., Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 321, 75 S. Ct. 368, 374 (1955) (state law determines the effect of breach of warranty in a marine insurance policy). Indeed, "[i]n the field of . . . maritime torts, the National Government has left much regulatory power in the States." *Id.* at 313, 75 S. Ct. at 370.

Whether a state law may provide a rule of decision in an admiralty case depends on whether the state rule "conflicts" with the substantive principles of federal admiralty law. As Judge Aldisert explained in *Floyd v. Lykes Bros. S.S. Co.*, 844 F.2d 1044, 1047 (3d Cir. 1988), "state law may supplement maritime law when maritime law is silent or where a local matter is at issue, but state law may not be applied where it would conflict with [federal] maritime law." *See also Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 341, 93 S. Ct. 1590, 1600 (1973) (courts in admiralty cases may reach beyond maritime precedents and apply state law "absent a clear conflict with the federal law"); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409-10, 74 S. Ct. 202, 205 (1953) ("[S]tates may sometimes supplement federal maritime policies . . . ."); *Sosebee v.*

Rath, 893 F.2d 54, 56-57 (3rd Cir. 1990) (maritime law preempts territorial attorney fees provision that directly conflicts with federal law). Thus, in the context of this case, the Pennsylvania wrongful death and survival statutes (or the Puerto Rico death and survival actions) may apply unless they conflict with a substantive rule of federal admiralty law.

We view this question as being quite similar, if not identical, to the preemption analysis articulated in *Clearfield Trust Co. v. United States*, 318 U.S. 363, 63 S. Ct. 573 (1943), and its progeny, *see, e.g., United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 594, 93 S. Ct. 2389, 2398 (1973); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728-29, 99 S. Ct. 1448, 1458-59 (1979); *Boyle v. United Technologies Corp.*, 487 U.S. 500, 507 n.3, 108 S. Ct. 2510, 2516 n.3 (1988); *O'Melveny & Myers v. F.D.I.C.*, 114 S. Ct. 2048, 2053 (1994). These cases recognize that there are areas of unique federal interest which are entirely governed by federal law, but where federal law nevertheless "borrows," *see Little Lake Misere*, 412 U.S. at 594, 93 S. Ct. at 2398, or "incorporates" or "adopts," *see Kimbell Foods*, 440 U.S. at 728-30, 99 S. Ct. at 1458-59, state law except where a significant conflict with federal policy exists.

While it is clear that under certain circumstances the general maritime law — including the wrongful death rule of *Moragne* — may incorporate state law as its rule of decision, the Supreme Court has begun to view the distinction between federal law incorporating state law as a rule of decision and state law operating of its own force as of theoretical importance only. *See O'Melveny & Myers*, 114 S. Ct. at 2048 ("In any event, knowing whether 'federal law governs' in the *Kimbell Foods* sense — a sense which includes federal adoption of state-law rules — does not much advance the ball. The issue in the present case is whether the [state] rule of decision is to be applied . . . or displaced, and if it *is* applied it is of only theoretical interest whether the basis for that application is [the state's] sovereign power or federal adoption of [the state's] disposition.") (citation omitted). More precisely, although drawing such a distinction identifies the sovereign "power" being exercised, it does not have any real bearing on the

practical question whether the state law rule of decision will apply or be displaced. *See id.*[6] Thus, because it makes little practical difference as to whether the general maritime law has incorporated state law or whether state law provides a rule of decision of its own force, we simply refer to the problem as "displacement of state law."[7]

In admiralty law, determining whether federal maritime law conflicts with and thus displaces state law has proven to be extremely tricky. Although we are told time and again under maritime preemption doctrine that a conflict exists where state law prejudices the "characteristic features" of federal maritime law, or interferes with the "proper harmony and uniformity of that law," *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 216, 37 S. Ct. 524, 529 (1917), the *Jensen* language is little more than a convenient slogan, providing little guidance on the question whether there is a conflict. *See American Dredging*, 114 S. Ct. at 991 (Stevens, J., concurring) ("The unhelpful abstractness of [the *Jensen* language] leaves us without a reliable compass for navigating maritime pre-emption problems."). Indeed, the lack of a clearly delineated conflicts inquiry in this area has been problematic. The Supreme Court has consistently

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6. *See also Boyle*, 487 U.S. at 507 n.3, 108 S. Ct. at 2516 n.3 ("We refer here to the displacement of state law, although it is possible to analyze it as the displacement of federal-law reference to state law for the rule of decision. [Citing *Little Lake Misere* and *Kimbell Foods*]. We see nothing to be gained by expanding the theoretical scope of the federal pre-emption beyond its practical effect, and so adopt the more modest terminology. If the distinction between displacement of state law and displacement of federal law's incorporation of state law ever makes a practical difference, it at least does not do so in the present case."); Martha Field, *Sources of Law: The Scope of Federal Common Law*, 99 Harv. L. Rev. 881, 977 & n.408 (1986) ("[The] distinction between state law applying directly and state law applying through federal reference is of dubious relevance.").

7. The correct analytic conclusion, we believe, is that admiralty law simply has not spoken to the factual situation of this case, *see infra* at typescript 28-32, 32-39, and that state laws accordingly apply of their own force. Were we to find federal admiralty law governing wrongful death and survival actions applicable to the death of a recreational boater occurring within state territorial waters, however, our analysis would likely lead us to hold that admiralty law either does not displace or adopts (or incorporates) state (or territorial) tort law. *See infra* at n.33.

struggled with setting the boundary between conflicting and non-conflicting state regulation in the area of maritime affairs, and has recently admitted,

> [i]t would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernible in our admiralty jurisprudence, or indeed is even entirely consistent within our admiralty jurisprudence. Compare [*Kossick v. United Fruit Co.*, 365 U.S. 731, 81 S. Ct. 886 (1961)] (state law cannot require provision of maritime contract to be in writing), with *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 75 S. Ct. 368 [(1955)] (state law can determine effect of breach of warranty in marine insurance policy).

American Dredging, 114 S. Ct. at 987-88 (parallel citation omitted). *See also* GRANT GILMORE & CHARLES L. BLACK, THE LAW OF ADMIRALTY § 1-17, at 49 (2d ed. 1975) ("The concepts that have been fashioned for drawing [the line between state and federal law] are too vague, as we have seen, to ensure either predictability or wisdom in the line's actual drawing.").

In our view, however, the maritime preemption doctrine is not significantly different from the preemption doctrine applicable to non-maritime contexts. *See American Dredging*, 114 S. Ct. at 992 (Stevens, J., concurring); *Wilburn Boat Co.*, 348 U.S. at 324, 75 S. Ct. at 376 (Frankfurter, J., concurring) (maritime preemption analysis factors "are not unlike those involved when the question is whether a State, in the absence of congressional action, may regulate some matters even though aspects of interstate commerce are affected"); *id.* at 333, 75 S. Ct. at 381 (Reed, J., dissenting) ("Since Congress has power to make federal jurisdiction and legislation exclusive, the [preemption] situation in admiralty is somewhat analogous to that governing state action interfering with interstate commerce."). Therefore, resort to non-maritime preemption doctrine by way of analogy may help sharpen the focus of the inquiry.[8]

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8. The analogy is not perfect. In *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 40 S. Ct. 438 (1920), and *Washington v. W.C. Dawson & Co.*,

Stated succinctly, in the absence of an express statement by Congress (express preemption), (implied) preemption could occur either where Congress intended that federal law occupy the field (field preemption) or where there is an actual conflict between state and federal law such that: (1) compliance with both federal and state law is impossible; or (2) state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *See California v. ARC America Corp.*, 490 U.S. 93, 100-01, 109 S. Ct. 1661, 1665 (1989) (antitrust).[9]

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264 U.S. 219, 44 S. Ct. 302 (1924), the Supreme Court held that some state regulation of maritime matters, even where authorized by Congress, was precluded directly by the Constitution and the uniformity implications of its grant of federal maritime jurisdiction. *See Knickerbocker*, 253 U.S. at 163-64, 40 S. Ct. at 441; *W.C. Dawson & Co.*, 264 U.S. at 227-28, 44 S. Ct. at 302. In *Knickerbocker*, however, a congressional enactment authorizing state workers' compensation laws to govern maritime workers was held unconstitutional "because their provisions were held to modify or displace essential features of the substantive maritime law." *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 124, 44 S. Ct. 274, 277 (1924). And in *W.C. Dawson & Co.*, a similar congressional act was invalidated because it "permit[ted] any state to alter the maritime law and thereby introduce conflicting requirements." *W.C. Dawson & Co.*, 264 U.S. at 228, 40 S. Ct. at 305. Although these cases have not been explicitly overruled by the Court, they rest on a strong nondelegation doctrine the likes of which has not been seen since the 1930s. At all events, by contrast to the situations in *Knickerbocker* and *W.C. Dawson*, as we detail below, here we discern no maritime law governing the plaintiffs' wrongful death and survival actions and no federal interest whose uniformity would be unconstitutionally impaired by application of state law.

9. The full *Jensen* preemption analysis is contained in the now famous passage stating that state legislation affecting maritime commerce is invalid "if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations." *Jensen*, 244 U.S. at 216, 37 S. Ct. at 529. This language seems to include the express preemption and implied preemption concepts of the non-maritime preemption doctrines. The language also seems to leave room for field preemption, although it does not appear to reference it as clearly. But as the First Circuit has recently recognized in *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623, 626-27 (1st Cir. 1994), in

In non-maritime cases, the determination whether there is a conflict between state and federal law in large part turns on the interpretation of federal statutes. *See Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68, 86 S. Ct. 1301, 1304 (1966) ("Whether latent federal power should be exercised to displace state law is primarily a decision for Congress."). [10] In addition, non-maritime cases employ a presumption against preemption. That is, a court should construe a federal substantive rule in such a way that it does not conflict with a state rule in an area traditionally regulated by the states. *See ARC America*, 490 U.S. at 102, 109 S. Ct. at 1665. In admiralty law a similar presumption is incorporated in the case law by the requirement that there be a "clear conflict" before state laws are preempted. *See Askew*, 411 U.S. at 341, 93 S. Ct. at 1600; *cf. Ballard Shipping v. Beach Shellfish*, 32 F.3d 623, 630 (1st Cir. 1994) (stating that where a state remedy is aimed at a

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American Dredging, 114 S. Ct. at 987, the Supreme Court gave the *Jensen* "characteristic features" language a limited meaning, "[I]t read[] the phrase to apply — and apparently only to apply — to a federal rule that either 'originated in admiralty' or has 'exclusive application there.'" *Ballard Shipping*, 32 F.3d at 627. Under this restrictive reading, wrongful death and survival statutes would materially prejudice no "characteristic feature" of admiralty because the wrongful death and survival remedies did not originate in or have exclusive application in admiralty. Because applying these state remedies would not conflict with any congressional legislation, *see infra* at typescript 28-32, 32-39, the focus of the inquiry in this case, therefore, is whether the application of state rules of decision will unduly interfere with the uniformity of federal maritime principles.

10. Maritime law is not simply a creature of statute but is more an amalgam of common law and statutory principles. But as we discuss in the next section, the development of the federal law of maritime deaths has become increasingly defined by statute, and the federal statutory schemes have taken a preeminent role in shaping the federal maritime death remedies, including those provided by federal common law. This development, in our view, brings the federal admiralty preemption doctrine more into line with the run-of-the-mill preemption case law, where the focus of the inquiry is in large part on statutory interpretation. *Cf. Ballard Shipping*, 32 F.3d at 630-31 (looking to a recently enacted statute to determine whether a federal common law rule displaced a state statute).

"great and legitimate state concern," a federal court must act with caution before finding displacement of state law).

In light of these general principles, the question in this case — whether state statutory remedies can provide the rule of decision when a recreational boater is killed in territorial waters — largely reduces to an inquiry into whether the different substantive admiralty rules articulated in federal statutes and at common law would be frustrated by the application of state law. *Pope & Talbot, Inc.*, 346 U.S. at 410, 74 S. Ct. at 205 ("[A] state may not deprive a person of any substantial admiralty right as defined in controlling acts of Congress or by interpretative decisions of this Court."); *Wilburn Boat Co.*, 348 U.S. at 332, 75 S. Ct. at 381 (Reed, J., dissenting) ("State power may be exercised where it is complementary to the general admiralty law. It may not be exercised where it would have the effect of harming any necessary or desirable uniformity."); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 228, 106 S. Ct. 2485, 2497 (1986) ("[W]here Congress had spoken, or where general federal maritime law controlled, the States exercising concurrent jurisdiction over maritime matters could not apply conflicting state substantive law.").

But before determining whether the substantive federal policies concerning maritime deaths would be frustrated, it is important to know what policies have, and have not, been articulated. This requires some understanding of the history behind the development of federal remedies for maritime deaths. Although the "tortuous development"[11] of the federal remedies for maritime deaths is familiar to many, and has been amply described elsewhere in the case law,[12] it is essential background, and so we will describe at least the major developments.

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11. *Tallentire*, 477 U.S. at 212, 106 S. Ct. at 2488 ("The tortuous development of the law of wrongful death in the maritime context illustrates the truth of Justice Cardozo's observation that '[death] is a composer of strife by the general law of the sea as it was for many centuries by the common law of the land.'") (quoting *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 371, 53 S. Ct. 173, 174 (1932)).

12. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 23-27, 111 S. Ct. 317, 320-23 (1990); *Tallentire*, 477 U.S. at 212-17, 106 S. Ct. at 2488-91.

III. THE RELEVANT FEDERAL LAW

A. *EARLIER BACKGROUND: FROM* THE HARRISBURG *TO* MORAGNE

In 1886, the Supreme Court held in *The Harrisburg*, 119 U.S. 199, 7 S. Ct. 140, that in the absence of an applicable state or federal statute, the general maritime law did not afford a wrongful death cause of action to the survivors of individuals killed on the high seas, or waters navigable from the sea. The harshness of this rule prompted reaction from district and appeals courts, subsequent Supreme Courts, and Congress. District and appeals courts began to allow recovery for deaths within state territorial waters where the state had an applicable wrongful death statute. *See Tallentire*, 477 U.S. at 212, 106 S. Ct. at 2489.[13] The Supreme Court held in *The Hamilton*, 207 U.S. 398, 28 S. Ct. 133 (1907), that state wrongful death statutes could, in limited circumstances, be applied to fatal accidents occurring on the high seas.[14] Most importantly, Congress, in 1920, enacted (1) the Death on the High Seas Act

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13. *Tallentire* cited, *inter alia*, *City of Norwalk*, 55 F. 98, 108 (S.D.N.Y. 1893) (state wrongful death statute may validly be applied to "maritime affairs within the state limits"), *aff'd in part, rev'd in part on other grounds*, 61 F. 364, 367-68 (2d Cir. 1894) (application of state wrongful death statute to accident in state territorial waters valid "in the absence of any regulation of the subject by [C]ongress") (citing *Steamboat Co. v. Chase*, 83 U.S. (16 Wall.) 522 (1873) and *Sherlock v. Alling*, 93 U.S. (3 Otto) 99 (1876)).

14. Under *The Hamilton*, state wrongful death statutes could apply in admiralty on the high seas where (1) the statutes were *intended* to apply on the high seas, *see Tallentire*, 477 U.S. at 213, 106 S. Ct. at 2489, which was not often the case, *id.* at 213-14, 106 S. Ct. at 2489-90 (quoting *Moragne*, 398 U.S. at 393 n.10, 90 S. Ct. at 1784 n.10); and either (2) "the vessel upon which the wrongful act occurred was constructively part of the territory of the state," or (3) "the wrongdoer was a vessel or citizen of the state subject to its jurisdiction even when beyond its territorial limits," *id.* at 214, 106 S. Ct. at 2490 (quoting *Wilson v. Transocean Airlines*, 121 F. Supp. 85, 88 (N.D. Cal. 1954)). As *Tallentire* notes, however, the limitations placed on the operation of state statutes for deaths on the high seas made *The Hamilton* of little practical import in allowing recovery for wrongful death. *Tallentire*, 477 U.S. at 213-14, 106 S. Ct. at 2489-90.

("DOHSA") which provided a federal wrongful death remedy for survivors of all persons, seamen and non-seamen, killed on the high seas, 46 U.S.C.A. §§ 761-768 (1975 & Supp. 1994), and (2) the Jones Act, which gives, among other things, a remedy for the wrongful death of a seaman resulting from a personal injury suffered during the course of the seaman's employment, 46 U.S.C.A. § 688 (1975 & Supp. 1994).

These developments, particularly the enactment of DOHSA and the Jones Act, ensured that a wrongful death remedy would be available for most people killed in maritime accidents. Thus, between 1920 and 1970, deaths on the high seas were remedied by DOHSA, deaths in territorial waters were remedied by state wrongful-death statutes, and deaths of seamen (whether on the high seas or in territorial waters) were remedied by the Jones Act. *The Harrisburg*, however, remained troublesome. Part of the trouble stemmed from the development of different theories of recovery for maritime deaths. Explanation of this difficulty requires reference to the two basic theories on which a seaman can recover for personal injuries.

First, the seaman can claim that the shipowner or some other potentially liable party was negligent; that is the basis for recovery under the Jones Act. Second, the seaman can claim that the vessel was unseaworthy. The doctrine of unseaworthiness basically imposes on a shipowner a nondelegable duty to provide seamen a vessel that is reasonably fit for its purpose;[15] it is a "species of liability without fault." *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 94-95, 66 S. Ct. 872, 877 (1946).[16] *The Harrisburg*,

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15. "[I]n the case of non-seamen, the only duty owed by ship-owners is that of exercising due care under the circumstances." 2 BENEDICT ON ADMIRALTY § 81(c), at 7-9 n.18 (7th ed. 1994) (citing *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 79 S. Ct. 406 (1959)).

16. *Sieracki* is better known for its holding that longshore workers were entitled to a warranty of seaworthiness, *id.* at 97, 66 S. Ct. at 878, thus creating "*Sieracki*-seamen." That part of the case was made obsolete by the 1972 amendments to the Longshore and Harbor Workers Compensation Act ("LHWCA"), *see* 33 U.S.C.A. § 905(b) (1986), which precluded longshoremen from taking advantage of the doctrine of unseaworthiness.

however, sharply limited the operation of the doctrine of unseaworthiness when a seaman was killed (as opposed to just being injured) within territorial waters, in the following manner.

Under *The Harrisburg* there was no right to recover for wrongful death under federal maritime law, either on a negligence theory or on an unseaworthiness theory. Although DOHSA allowed recovery based on unseaworthiness for deaths outside the three mile territorial limit, DOHSA did not apply to injuries within territorial waters. This meant that a seaman's survivors could not take advantage of the unseaworthiness doctrine when the seaman was killed in territorial waters unless a state statute allowed recovery based on such a theory. And although some state statutes did, *see The Tungus v. Skovgaard*, 358 U.S. 588, 79 S. Ct. 503 (1959) (allowing wrongful death action based on the doctrine of unseaworthiness because New Jersey wrongful death statute was construed to allow such a theory), some did not, *see Moragne v. State Marine Lines*, 211 So. 2d 161, 166 (Fla. 1968) (holding that Florida wrongful death statute did not allow recovery for unseaworthiness).

The Harrisburg also created a *complete* bar to recovery for unseaworthiness for "Jones Act seamen" killed in territorial waters when it was combined with *Lindgren v. United States*, 281 U.S. 38, 50 S. Ct. 207 (1930), and *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 85 S. Ct. 308 (1964).[17] *Lindgren* and *Gillespie* held that the Jones Act was the exclusive wrongful death remedy for seamen and could not be supplemented by state wrongful death actions.[18] The result was that, since the Jones Act allowed recovery only on the basis of negligence, the doctrine of unseaworthiness

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17. We use the term "Jones Act seamen" in contrast to "Sieracki-seamen," *see supra* n. 16.

18. It is important to note here that both *Lindgren* and *Gillespie* were limited to the preemptive effect of the Jones Act's wrongful death remedy on state wrongful death statutes. They did not challenge the Supreme Court's holding in *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 64 S. Ct. 455 (1944), that an injured Jones Act seaman could invoke the doctrine of unseaworthiness to sue for *injuries*, wherever contracted.

was of no aid to a Jones Act seaman who was killed within territorial waters. *See Kernan v. American Dredging Co.*, 355 U.S. 426, 428-30, 78 S. Ct. 394, 396-97 (1958).

The combination of *The Harrisburg*, *Lindgren*, and *Gillespie* created disarray in the field of remedies for wrongful death of seamen, and led to three "anomalies" or "incongruities" in admiralty law that eventually made the regime intolerable.[19] "First, in territorial waters, general maritime law allowed a remedy for unseaworthiness resulting in injury, but not for death." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 26, 111 S. Ct. 317, 322 (1990). Second, survivors of seamen killed outside the three-mile territorial limit could pursue a wrongful death action based on unseaworthiness, while survivors of those killed inside territorial waters could not, unless a state wrongful death statute allowed recovery based on unseaworthiness. *Moragne*, 398 U.S. at 395, 90 S. Ct. at 1785. Third, survivors of a "*Sieracki*-seaman," *see supra* at n.16, could recover for a death within territorial waters under applicable state statutes, while survivors of a Jones Act seaman (a "true" seaman) could not. *Moragne*, 398 U.S. at 395-96, 90 S. Ct. at 1785.

In 1970 the Supreme Court decided that enough was enough, and in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S. Ct. 1772 (1970), the Court overruled *The Harrisburg* and recognized a general maritime wrongful death cause of action under federal common law. *Id.* at 378, 90 S. Ct. at 1776. *Moragne* was, by all accounts, a landmark case. Although its specific holding merely created a general maritime wrongful death remedy based on the doctrine of unseaworthiness, it has since been interpreted as creating a wrongful death remedy based on negligence. *See* GILMORE & BLACK § 6-33, at 368 ("The remedy provides recovery for deaths caused by negligence as well as for deaths caused by unseaworthiness . . . ."); *Miles v. Melrose*, 882 F.2d 976, 985 (5th Cir. 1989), *aff'd sub nom. Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S. Ct. 317 (1990).[20]

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19. The "anomalies" were explained in *Moragne*, 398 U.S. 394-96, 90 S. Ct. at 1784-85.

20. The case law, however, does not uniformly hold that the *Moragne* wrongful death remedy applies to claims based on negligence. *See, e.g.*,

Moragne has, of course, been the focus of detailed analysis and description in the case law and commentaries, which we need not repeat here. It is important, however, to point out that, to justify creating the general maritime wrongful death remedy, the Court invoked the need for "uniform vindication of federal policies,"[21] and the "humane and liberal character of proceedings in admiralty."[22]

One aspect of *Moragne* — a jurisprudential one — must however be related in some detail. *Moragne* brought to the fore the importance of federal statutory remedies in determining the appropriate shape of the general maritime law. At the time *Moragne* was decided, DOHSA and the Jones Act both provided wrongful death remedies in admiralty. The existence of these statutory schemes left it unclear whether a court could create a federal common law rule in the area. Although DOHSA and the Jones Act reflected a strong public policy favoring survivors' recovery for wrongful deaths, at the same time they also may have represented a considered legislative judgment that wrongful

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Ford v. Wooten, 681 F.2d 712, 715-16 (11th Cir. 1982) (holding that the *Moragne* remedy applies only to unseaworthiness, not negligence); *Ivy v. Security Barge Lines, Inc.*, 606 F.2d 524, 527 (5th Cir. 1979) (en banc) (same, as concerns Jones Act seamen).

21. As Justice Harlan put it:

> Our recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts. Such uniformity not only will further the concerns of both of the 1920 Acts [DOHSA and the Jones Act] but also will give effect to the constitutionally based principle that federal law should be a system of law coextensive with, and operating uniformly in, the whole country.

Moragne, 398 U.S. at 401-02, 90 S. Ct. at 1788 (internal quotation marks and citations omitted).

22. *Id.* at 387, 90 S. Ct. at 1780-81 (quoting *The Sea Gull*, 21 Fed. Cas. 909-10 (C.C.D. Md. 1865) (No. 12,578)). The *Moragne* court recognized that the maritime law "included a special solicitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages." *Id.*

death remedies should go no further than those provided for by statute.

The undertaking in *Moragne*, in large part, was to determine whether the existing statutory remedies were to place a ceiling or a floor on available remedies for wrongful death. After searching the federal legislation and the case law, the *Moragne* court concluded that "Congress [had] given no affirmative indication of an intent to preclude the judicial allowance of a remedy for wrongful death to persons in the situation of [the] petitioner." *Moragne*, 398 U.S. at 393, 90 S. Ct. at 1784. In the absence of such an affirmative indication from Congress, the Court believed it appropriate to recognize a general maritime wrongful death cause of action. As we detail below, this aspect of *Moragne* — the importance of federal statutory schemes in shaping non-statutory remedies — has been particularly far reaching in the Court's wrongful death jurisprudence since *Moragne*.

B. THE POST-MORAGNE CASES: GAUDET, HIGGINBOTHAM, TALLENTIRE, *AND* MILES

Four post-*Moragne* decisions are particularly important to our decision: *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 94 S. Ct. 806 (1974); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 98 S. Ct. 2010 (1978); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 106 S. Ct. 2485 (1986); and *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S. Ct. 317 (1990). These cases have further refined the federal maritime cause of action recognized in *Moragne* and provide some outline of the legal architecture for maritime death claims. But although they adumbrate the domains in which federal statutory, federal common law, and state statutory remedies operate to provide a rule of decision in maritime death cases, a brief survey of these decisions shows that significant areas of uncertainty remain.

1. GAUDET

Gaudet addressed the types of damages available for a longshoreman killed in territorial waters, 414 U.S. at 573, 94 S. Ct. at 806, and concluded that nonpecuniary damages for loss of society were available. *Id.* at 587-88, 94

S. Ct. at 816. Although recognizing that DOHSA did not compensate for nonpecuniary losses, *id.* at 588 n.22, 94 S. Ct. at 816 n.22, the Court studiously ignored the example of DOHSA and followed the "humanitarian policy of the maritime law" that favored recovery for loss of society. *Id.* at 588, 94 S. Ct. at 816. Three aspects of *Gaudet* are worth mentioning. First, the decision recognizes damages for loss of society as being available in a general maritime wrongful death action. *Id.* at 587, 94 S. Ct. at 816. Second, on its face, *Gaudet* appears to approve of the application of state statutes in maritime death cases.[23] *See id.* at 587-88, 94 S. Ct. at 816. Third, and perhaps most important, *Gaudet* (together with its offspring, *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 100 S. Ct. 1673 (1980)) represents the first, and last, time that the Court departed from the guidance of federal statutory wrongful death remedies in shaping recovery for wrongful death.[24] *Cf. Gaudet*, 414 U.S. at 601-02, 605, 94 S. Ct. at 823, 825 (Powell, J., dissenting). Indeed, since *Gaudet*, the Court, disapproving of that decision but reluctant to overrule it directly, has narrowed the case to its facts so that the

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23. *Gaudet* also cited approvingly to a decision of this court. *Dugas v. National Aircraft Corp.*, 438 F.2d 1386 (3d Cir. 1971), which joined a state survival statute to a general maritime wrongful death cause of action. *Gaudet*, 414 U.S. at 588 n.24, 94 S. Ct. at 817 n.24.

24. In *American Export Lines*, the Supreme Court held that general maritime law allowed the wife of a harbor worker to bring an action for damages for loss of society due to a maritime tort suffered by her husband. Although DOHSA and the Jones Act did not themselves provide such non-pecuniary damages, the Court allowed them, reasoning a la *Gaudet* that DOHSA was the exclusive remedy only for "*fatal* injuries incurred on the "*high* seas." 446 U.S. at 282, 100 S. Ct. at 1678, and that "the Jones Act does not exhaustively or exclusively regulate longshoremen's remedies." *Id.* at 282-83, 100 S. Ct. at 1678.

Miles v. Apex Marine Corp., 498 U.S. 19, 111 S. Ct. 317 (1990), allowed a maritime wrongful death action for the death of a Jones Act seaman in territorial waters due to unseaworthiness. Despite the Jones Act's provision of liability only for deaths due to *negligence*, the holding in *Miles* may still be seen as following congressional guidance in that DOHSA allowed recovery for deaths occurring on the high seas due to unseaworthiness, and the Court's holding merely harmonized those two statutes.

decision may be, for all intents and purposes, a dead letter. *See Miller v. American President Lines*, 989 F.2d 1450, 1458 (6th Cir. 1993) ("Although *Gaudet* has never been overruled, its holding has been limited over the years to the point that it is virtually meaningless."), *cert. denied*, 114 S. Ct. 304 (1993).

2. *HIGGINBOTHAM*

In *Higginbotham*, 436 U.S. at 618, 98 S. Ct. at 2010, the Court addressed the question whether survivors of a person killed on the high seas were entitled to recover damages under federal maritime law in addition to the damages available under DOHSA. Of particular interest to the Court was whether the loss of society damages recognized in *Gaudet* were available where the death occurred on the high seas notwithstanding the fact that DOHSA itself did not allow for loss of society damages. The Court's answer was "no." The reasoning of *Higginbotham* was straightforward: Congress had specifically spoken to the issue of damages in DOHSA and provided damages only for pecuniary losses, and it was not open to the Court to authorize supplementary relief that went beyond that authorized by Congress. *Id.* at 626, 98 S. Ct. at 2015. Although not explicit in the decision, *Higginbotham* drew its inspiration directly from the statutory analysis in *Moragne* that we have identified above.[25] The only difference between the analysis in *Moragne* and that in *Higginbotham* is that while *Moragne* saw a gap in the statutory scheme, *Higginbotham* saw none. *See id.* at 625, 98 S. Ct. at 2015.

3. *TALLENTIRE*

Eight years later came *Tallentire*, 477 U.S at 207, 106 S. Ct. at 2485, which involved a claim for damages for a death on the high seas. This time the question was whether remedies available under a state wrongful death action could supplement the remedies available under DOHSA. The Court again said "no," holding that the Louisiana wrongful death statute (which allowed recovery for loss of society) could not apply to a claim governed by DOHSA. *Id.*

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25. *But see id.* at 625, 98 S. Ct. at 2015 (citing *Moragne*'s discussion of congressional intent concerning DOHSA).

at 233, 106 S. Ct. at 2499. Again, the analysis had been foreshadowed by *Moragne* and *Higginbotham*: Congress had spoken directly to the question of damages for deaths on the high seas in DOHSA, and the Court was not free to supplement the statutory scheme (with a state law remedy).

The main battle in *Tallentire*, however, was not over the *applicability* of the *Higginbotham* mode of analysis to a state wrongful death statute;[26] rather, the principal dispute was over the *construction* of Section 7 of DOHSA, which provided in pertinent part that

> [t]he provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter.

46 U.S.C.A. § 767 (1975). A circuit split existed on the question whether this section preserved the operation of state wrongful death statutes for deaths on the high seas. In a 5-4 decision, the Court held that the clause was nothing more than a jurisdictional savings clause which preserved the rights of state courts to "entertain causes of action and provide wrongful death remedies both for accidents arising on territorial waters and, under DOHSA, for accidents occurring more than one marine league from shore." *Tallentire*, 477 U.S. at 221, 106 S. Ct. at 2493.

Although the Court justified its result in part by stressing the advantage of having a uniform remedy for deaths on the high seas, *see id.* at 230-31, 106 S. Ct. at 2498-99, the Court's reasoning was ultimately grounded on its interpretation of the legislative history of Section 7 of DOHSA. In surveying the legislative history of DOHSA, the Court stated that Section 7 was included in the act in order to save state remedies within territorial waters. According to the Court, "[t]he reach of DOHSA's substantive provisions was explicitly limited to actions arising from accidents on the high seas, so as to 'prevent the Act from abrogating by its own force, the state remedies then

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26. *Tallentire* also discussed the applicability of the remedies afforded under the Outer Continental Shelf Lands Act, 43 U.S.C.A. § 1331 et. seq. (1986 & Supp. 1994), *id.* at 217, 106 S. Ct. at 2491, but that discussion is not pertinent here.

available in state waters.'" *Id.* at 224, 106 S. Ct. at 2495 (quoting *Higginbotham*, 436 U.S. at 621-22, 98 S. Ct. at 2013) (internal citation omitted). It concluded that

> because DOHSA by its terms extended only to the high seas and therefore was thought not to displace these state remedies on territorial waters, [see *Moragne*], § 7, as originally proposed, ensured that the Act saved to survivors of those killed on territorial waters the ability to pursue a state wrongful death remedy in state court.

Id. at 224-25, 106 S. Ct. at 2495. According to one commentator, the implication of the Court's decision in *Tallentire* is that although survivors of a person killed on the high seas may seek only the limited recovery provided by DOHSA, "[i]f the same accident occurs within a marine league from shore, where [DOHSA] has no effect, the survivors can recover damages under the state wrongful death statute, including, when provided, reimbursement for non-economic losses." 14 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3672, at 295 (Supp. 1994).

4. *MILES*

The latest case in the Court's wrongful death jurisprudence is *Miles*, 498 S. Ct. at 19, 111 S. Ct. at 317. In *Miles*, the mother of a Jones Act seaman killed in territorial waters pressed a *Moragne* cause of action based on the doctrine of unseaworthiness. The Court considered two issues: first, whether the Jones Act provided the exclusive measure of remedies for the death of a Jones Act seaman where recovery was premised on the *Moragne* cause of action, and second, whether a general maritime survival action recognized loss of future earnings for a Jones Act seaman. The Court held that the Jones Act damages were the exclusive measure of damages allowed to a Jones Act seaman, regardless of whether the claim was based on *Moragne*; it then held that the Jones Act damages controlled any recovery based on a general maritime survival action for the death of a Jones Act seaman, and that since the Jones Act did not allow recovery for future earnings, they were not recoverable under *Moragne*. *Id.* at 32-33, 36, 111 S. Ct. at 326, 328.

Miles reflects the preeminence that the *Moragne* statutory analysis has achieved in shaping wrongful death remedies. By the time of *Miles*, the entire inquiry into remedies for deaths has been reoriented into an inquiry into what the relevant statutes had stated.

> We have described *Moragne* at length because it exemplifies the fundamental principles that guide our decision in this case. We no longer live in an era when seamen and their loved ones must look primarily to the courts as a source of substantive legal protection from injury and death; Congress and the States have legislated extensively in these areas. In this era, an admiralty court should look primarily to these legislative enactments for policy guidance.

Id. at 27, 111 S. Ct. at 323. But importantly for this appeal, *Miles* showed no great hostility to the operation of state statutes in providing rules of decision in admiralty cases.

The passage quoted above hints that state statutory schemes have a role to play in admiralty cases. Such a role received fuller articulation later in the *Miles* opinion, where the Court discussed the question whether a general maritime survival action existed. Although it ultimately declined to address the issue, the Court's discussion seemed to sanction some lower courts' practice of applying state survival statutes to deaths at sea. *Id.* at 326 ("Most States have survival statutes applicable to tort actions generally, and admiralty courts have applied these state statutes in many instances to preserve suits for injury at sea. . . . Where these state statutes do not apply, however, or where there is no state survival statute, there is no survival of unseaworthiness claims absent a change in the traditional maritime rule.") (internal citations and footnote omitted).

5. *EMERGING TRENDS*

Although the trend in the post-*Moragne* case law can be explained by reference to the rise in the importance of federal statutory schemes in shaping maritime remedies, it would be myopic not to recognize the other forces at work. One trend that cannot be ignored is that the Court seems to be cutting back on plaintiffs' rights in maritime actions.

Throughout the 1950s and 1960s, the Supreme Court expanded the rights of plaintiffs by generally allowing plaintiffs the benefit of whichever rule, state or federal, was more favorable to recovery. *See* GILMORE & BLACK § 6-61, at 463-68. *Moragne* — or perhaps *Gaudet* — represented the apex of the Court's policy of expanding plaintiffs' rights in admiralty actions. *Higginbotham*, *Tallentire*, and *Miles*, in contrast, show a tendency on the part of the Court during the last two decades to reverse its policy of favoring seamen plaintiffs.

A second trend is the weakness with which the principle of uniformity, i.e., the notion that *Moragne* initiated a trend in the case law to make recovery for maritime deaths more uniform — which permeates the rhetoric of the case law — has been actually applied in these cases. For, although the cases often mention uniformity as a guiding principle, the Court's actions belie its importance. *Higginbotham*, for example, quite consciously created an anomaly (the unavailability of non-pecuniary damages for wrongful death at high sea where such damages were available to longshoremen killed in territorial waters), stating that "a desire for uniformity cannot override the statute [DOHSA]." 436 U.S. at 624, 98 S. Ct. at 2014. Similarly, *Tallentire* rejected a rule that would make DOHSA recoveries consistent with those available under *Moragne* for deaths on territorial waters. *See Tallentire*, 477 U.S. at 233, 106 S. Ct. at 2499-500. And *Miles* viewed the variety of survival actions under state law without alarm, declining to fashion a uniform federal rule on the matter that would cover all plaintiffs. *See* 498 U.S. at 34, 111 S. Ct. at 326-27.[27] We

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27. *See also American Dredging*, 114 S. Ct. at 987:

> "It is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system[.] [b]ut this limitation still leaves the states a wide scope. State created liens are enforceable in admiralty. State remedies for wrongful death and state statutes providing for the survival of actions . . . have been upheld when applied to maritime causes of action. . . . State rules for the partition and sale of ships, state laws governing the specific performance of arbitration agreements, state laws regulating the effect of a breach of warranty under contracts of

believe that the thrust of these cases suggests that the concept of uniformity has a good deal less weight than has been thought, *see also Sutton v. Earles*, 26 F.3d 903, 917 (9th Cir. 1994) (invoking *Gaudet* and *Higginbotham* to reject uniformity argument untethered to statute), and that it has significance to the extent that it aids in the "vindication of federal policies," *Moragne*, 398 U.S. at 401, 90 S. Ct. at 1788.

C. WRONGFUL DEATH VS. SURVIVAL ACTIONS IN THE SCHEMA

We have discussed this case law at such length because a thorough understanding of it is critical to our analysis of the issue presented here. Before we turn to that analysis, however, we must identify another aspect of the legal background that often appears to be glossed over in the case law of maritime deaths. Throughout the previous discussion of the case law, reference has been made to wrongful death actions and to survival actions. Although they are often lumped together without any distinction, *see Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4 F.3d 1084, 1093 (2d Cir. 1993) (where plaintiffs treated as a single action a claim for "wrongful death and survivorship benefits"), they are, in fact, quite distinct. *See, e.g., Gaudet*, 414 U.S. at 575 n.2, 94 S. Ct. at 810 n.2 (distinguishing wrongful death statutes from survival statutes).

A wrongful death cause of action belongs to the decedent's dependents (or closest kin in the case of the death of a minor). It allows the beneficiaries to recover for the harm that *they* personally suffered as a result of the death, and it is totally independent of any cause of action the decedent may have had for his or her own personal injuries. Damages are determined by what the beneficiaries

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> maritime insurance — all these laws and others have been accepted as rules of decision in admiralty cases, even, at times, when they conflicted with a rule of maritime law which did not require uniformity."

(quoting *Romero*, 358 U.S. at 373-74, 79 S. Ct. at 480-81) (alterations and omissions in *American Dredging*).

would have "received" from the decedent and can include recovery for pecuniary losses like lost monetary support, and for non-pecuniary losses like loss of society. 2 BENEDICT ON ADMIRALTY § 81(a), at 7-2. A survival action, in contrast, belongs to the estate of the deceased (although it is usually brought by the deceased's relatives acting in a representative capacity) and allows recovery for the injury to the *deceased* by the action causing death. Under a survival action, the decedent's representative recovers for the decedent's pain and suffering, medical expenses, lost earnings (both past and future), and funeral expenses. *Id.*

The Jones Act (by incorporating the FELA) contains both a wrongful death provision and a survival provision. *Moragne*, 414 U.S. at 575 n.2, 576, 94 S. Ct. at 810 & n.2. DOHSA contains a wrongful death provision, but does not contain a survival provision. *Id.* General maritime law contains a wrongful death action by way of *Moragne*, but the Supreme Court has not recognized a survival action. As was mentioned above, both *Tallentire* and *Miles* have stressed that there is as yet no clear federal rule on the extent to which state survival remedies are available under DOHSA or *Moragne*. *See Miles*, 498 U.S. at 33-34 & n.2, 111 S. Ct. at 326-27 & n.2; *Tallentire*, 477 U.S. at 215 n.1, 106 S. Ct. at 2490 n.1 (declining to approve or disapprove of the application of state survival statutes to cases involving deaths on the high seas).

With this distinction in mind, we now turn to the question whether state wrongful death and survival statutes conflict with the principles articulated in the post-*Moragne* line of cases.

IV. CHOICE OF LAW ANALYSIS

As our previous analysis has shown, there is no federal rule, either statutory or at common law, that explicitly precludes the operation of state wrongful death or survival statutes in cases involving recreational boaters killed in territorial waters. DOHSA applies only to deaths on the high seas. The Jones Act applies only to seamen. And no Supreme Court case has explicitly held that *Moragne* displaces state wrongful death or survival remedies for non-

seamen killed in territorial waters. Of course, federal law still should displace the state wrongful death and survival statutes if such statutes stand as obstacles to the accomplishment and execution of the clearly expressed policies of federal maritime law. It appears, however, that neither state survival statutes nor wrongful death statutes stand as such obstacles.

A. SURVIVAL STATUTES

The question whether federal maritime law displaces state survival statutes in the context of recreational boaters killed in territorial waters need not detain us long. As we have explained above, there does not appear to be any substantive federal policy addressing survival actions for non-seamen. Although DOHSA does not contain a survival provision, its absence does not show that Congress expressed an "affirmative indication of an intent to preclude," *see Moragne*, 398 U.S. at 393, 90 S. Ct. at 1784, state survival statutes from operating in territorial waters for, as *Tallentire* tells us, Congress specifically limited the reach of DOHSA " 'so as to prevent the Act from abrogating by its own force the state remedies then available in state waters.' " *Tallentire*, 477 U.S. at 224, 106 S. Ct. at 2495 (quoting *Higginbotham*, 436 U.S. at 621-22, 98 S. Ct. at 2013).[28]

Moreover, although *Moragne* does not recognize a survival action, we do not believe that the Court's post-*Moragne* case law reflects any intent to preclude survival actions based on state law. Quite the contrary, in its discussion of

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28. Indeed, as we have mentioned, *Tallentire* left open the question whether state survival statutes could provide a rule of decision even for death on the high seas. *See also Miles*, 498 U.S. at 34 n.2, 111 S. Ct. at 326-27 n.2; *Dugas v. National Aircraft Corp.*, 438 F.2d 1386 (3d Cir. 1971) (holding that in lawsuit premised on DOHSA, Pennsylvania survival statute could be applied concurrently). And the Fifth Circuit has held, in the wake of the *Gaudet*, *Higginbotham*, *Tallentire*, and *Miles* quartet, that DOHSA does not preempt a general maritime survival action. *Barris v. Sulpicio Lines, Inc.*, 932 F.2d 1540, 1543 n.2 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 430 (1991); *Graham v. Milky Way Barge*, 824 F.2d 376, 386-87 (5th Cir. 1987).

the possible existence of a general maritime survival remedy in *Miles*, the Court seemed to endorse (or at least not preclude) the practice of applying state survival statutes for deaths occurring within territorial waters. *See* 498 U.S. at 33-34, 111 S. Ct. at 326.

In light of this case law, we hold that federal admiralty law, as articulated both by statute and by the federal common law, does not preempt the application of state survival statutes for deaths of recreational boaters (non-seamen) within territorial waters.[29] Such a holding, we believe, is the one most consistent with federal/state conflict of law principles, particularly the presumption against preemption. *See supra* at typescript 13-14. In our view, a holding contrary to the one we reach would require the conclusion that federal admiralty law conflicts with state law in an area where *neither* Congress *nor* admiralty law has provided any rule of decision. Such a holding would ignore traditional conflicts principles.

We also believe that our result is not inconsistent with the holding in *Miles* that future earnings, one of the major components of survival damages, are not available to a Jones Act seaman. Unlike DOHSA, the Jones Act does provide for a survival action, and under the Jones Act, recovery on a survival action is limited to losses suffered during the decedent's lifetime. See 45 U.S.C.A. § 59 (1986); *Miles*, 498 U.S. at 35, 111 S. Ct. at 327. As *Miles* recognized, *Congress* made the decision in the Jones Act to place a limit on a seaman's recovery, and hence the Supreme Court should not disregard "Congress' ordered system of recovery," *id.* at 36, 111 S. Ct. at 328, by supplementing recovery, even if forceful policy arguments favored recovery of future earnings, *id.* at 35-36, 111 S. Ct. at 327 ("There are indeed strong policy arguments for allowing [recovery of future earnings].").

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29. We have alternated in our discussion between the terms "recreational boaters" and non-seaman, and we mean to use the terms interchangeably. We do not mean to intimate that crew members of a racing yacht or some other non-recreational vessel should be treated differently than someone in Natalie Calhoun's position. The applicable remedy depends on whether such crew members fall within the Jones Act as seamen.

But the Jones Act applies only to seamen. And Yamaha has not demonstrated that Congress intended the limitation on damages in the Jones Act to extend beyond seamen. By its terms, the act is strictly limited to a certain class of plaintiffs. We believe that a state statute allowing recovery of future earnings would not be plainly inconsistent with the federal law, nor would it frustrate Congress' scheme of compensation for seamen, when it is applied to people who fall outside the scope of the congressionally mandated recovery scheme for maritime injuries and death.[30] *See also Garner v. Dravo Basic Materials Co.*, 768 F. Supp. 192, 195 (S.D. W. Va. 1991) (holding that *Miles* does not preclude loss of future earnings in death of a non-seaman because Jones Act does not extend to non-seamen).[31] In sum, we

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30. The Second Circuit has stated that the Court's language in *Miles* did not limit its holding to Jones Act seamen. *See Wahlstrom v. Kawasaki Heavy Indus. Inc.*, 4 F.3d 1084, 1093 (2d Cir. 1993). The Second Circuit reached this conclusion by stating:

> The Court's analysis relied heavily upon the decedent's status as a seaman and the resultant applicability of the Jones Act, but the announced conclusion of its opinion (unlike the companion ruling as to loss of society) was not confined to seamen.

Id. (internal citation omitted). However, the language from the conclusion in *Miles* — "We . . . hold that a general maritime survival action cannot include recovery for decedent's lost future earnings," 498 U.S. at 37, 111 S. Ct. at 328 — clearly referenced the particular decedent involved in that case. The language did not say "a decedent" or "any decedent." It simply said "decedent." We believe that the Second Circuit's reading of the conclusion is not compelled by the language, and given that such a reading ignores the Court's rationale for denying future earnings, we decline to follow it. *See also Sutton v. Earles*, 26 F.3d 903, 916-17 (9th Cir. 1994) (criticizing *Wahlstrom* and declining to follow its denial of loss-of-society damages to non-dependent parents).

31. Even assuming that the *Miles* holding extends beyond seamen, we are not sure that its rule against future earnings would extend to deny recovery of such earnings in the case at bar. The rule denying lost future earnings, implied from the exclusivity of the Jones Act, presupposes that the decedent had a livelihood and that his dependents would be entitled to damages for loss of support under the wrongful death provision. Apparently, the Jones Act denies recovery of lost future earnings only because, as *Miles* explained:

hold that general maritime law does not preempt state law survival statutes in survival actions based on the death of a nonseaman in territorial waters, and that such statutes consequently govern the instant case. We turn therefore to the question whether the federal maritime law displaces state wrongful death remedies.

B. WRONGFUL DEATH STATUTES

Whether federal admiralty law preempts state wrongful death statutes from applying to accidents to non-seamen in territorial waters presents a more difficult inquiry. *Moragne* apparently creates a federal wrongful death remedy that applies to non-seamen in territorial waters.[32] Yamaha

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Recovery of lost future earnings in a survival suit will, in many instances, be duplicative of recovery by dependents for loss of support in a wrongful death action; the support dependents lose as a result of the seaman's death would have come from the seaman's future earnings.

Miles, 498 U.S. at 35, 111 S. Ct. at 327. This rationale appears to be quite suspect when the decedent is someone who is not employed, especially a child. A child does not typically support her parents and so loss of support damages will be negligible. A child's expected future earnings, however, may be considerable. Allowing for lost future earnings under such circumstances raises minimal risk of duplicative recovery. In our view, to deny loss of future earnings under such circumstances gives a windfall to potential defendants. Thus, even if there is a federal rule which extends beyond seamen to conflict with a state survival statute allowing recovery of lost future earnings, we doubt that the federal rule would extend to deny lost future earnings when the decedent was a child and loss of support damages would be negligible. We also doubt its applicability to cases where the decedent was an adult who, unlike a Jones Act seaman, was unemployed. This analysis, we add, is not intended to suggest case-by-case preemption analysis, but rather to demonstrate why, in policy terms, the construction advanced by Yamaha is flawed and hence unlikely to have animated the Supreme Court. *See Garner*, 768 F. Supp. at 195.

32. The *Moragne* remedy might apply only to Jones Act seamen and to those others, including longshoremen, to whom a *federal* duty of seaworthiness or due care is owed. *Moragne* explicitly grounded its holding in the propriety of extending a federal remedy to correspond to the "federally imposed duties of maritime law," filling a gap left by some state statutes. *See Moragne*, 398 U.S. at 401 & n.15, 90 S. Ct. at 1788.

argues that *Moragne* therefore displaces state wrongful death statutes. But although we know that *Moragne* provides a wrongful death remedy, the precise contours of that remedy are not yet fully defined.[33] Unless applying

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33. Even if *Moragne* did provide a clear rule of decision in this area, however, the mere existence of a federal wrongful death cause of action does not necessarily require displacement. *Cf. California v. ARC America Corp.*, 490 U.S. 93, 101-02, 109 S. Ct. 1661, 1665 (1989) (concurrent application of federal and state rules of decision are allowed); *Tallentire*, 477 U.S. at 224, 106 S. Ct. at 2495 ("States could 'modify' or 'supplement' the federal maritime law by providing a wrongful death remedy enforceable in admiralty for accidents on territorial waters.") (citing *Western Fuel Co. v. Garcia*, 257 U.S. 233, 42 S. Ct. 89 (1921), and *Steamboat Co. v. Chase*, 16 Wall. 522, 21 L. Ed. 369 (1873)); GILMORE & BLACK § 1-17, at 49-50 ("All that can be said in general is that the states may not flatly contradict established maritime law, but may 'supplement' it, to the extent of allowing maritime recoveries in some cases where the maritime law denies them . . . ."). Concurrent application of state and federal law is commonplace, particularly in areas governed by federal common law. *See, e.g., ARC America*, 490 U.S. at 101-02, 109 S. Ct. at 1665 (antitrust); *Madruga v. Superior Court of California*, 346 U.S. 556, 561, 74 S. Ct. 298, 301 (1954) ("Aside from its inability to provide a remedy *in rem* for a maritime cause of action, . . . a state, 'having concurrent jurisdiction, is free to adopt such remedies, and to attach to them such incidents, as it sees fit' so long as it does not attempt to make changes in the 'substantive maritime law.'") (quoting *Red Cross Line*, 264 U.S. at 124, 44 S. Ct. at 277).

Indeed even where the states may impose liability beyond that imposed under federal law, there is not necessarily a conflict, particularly in the absence of a statement from Congress to the contrary. *See ARC America*, 490 U.S. at 105, 109 S. Ct. at 1667 ("Ordinarily, state law causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law, . . . and no clear purpose of Congress indicates that we should decide otherwise in this case.") (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 257-58, 104 S. Ct. 615, 626-27 (1989), and *California v. Zook*, 336 U.S 725, 736, 69 S. Ct. 841, 847 (1949)). In the traditional concurrent application of state law context, in which there is a clear federal rule, a legitimate state law may still apply if it does not impose too great a burden on the uniform vindication of the federal policy. *See, e.g., Ballard Shipping*, 32 F.3d at 630 (describing the interest-balancing approach and suggesting that the inquiry reduces to the "familiar one of burden"). Here, by contrast, there is no specific federal rule on point, and we thus need not analyze the question under the rubric of "incorporation." State law, subject to

state law would be inconsistent with, or would frustrate the operation of, a particular federal maritime rule of decision in this area, *Moragne* should not displace state law rules of decision for deaths of non-seamen in territorial waters.[34]

Yamaha's argument that *Moragne* displaces all state wrongful death statutes as rules of decision is fairly straightforward: both DOHSA and the Jones Act preempt state wrongful death statutes, so why shouldn't *Moragne*?[35] This argument, at least on its face, is seductive. *Tallentire*, *Higginbotham*, and *Miles* are to at least a certain extent the lineal descendants of *Jensen*, which introduced the

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possible preemption on grounds we have enumerated, applies of its own force. *See, e.g., Wilburn Boat Co.*, 348 U.S. at 316, 75 S. Ct. at 371 ("[The 'literal performance' rule of insurance contracts law] has not been judicially established as part of the body of federal admiralty law in this country. Therefore, the scope and validity of the [maritime insurance] policy provisions here involved and the consequences of breaching them can only be determined by state law unless we are now prepared to fashion controlling federal rules.").

34. And were *Moragne* to extend to persons in Natalie Calhoun's circumstances, we might hold that its wrongful death remedy either does not displace or actually incorporates state (and territorial) law; "the demand for uniformity is not inflexible and does not preclude the balancing of the competing claims of state, national and international interests." *Wilburn Boat Co.*, 348 U.S. at 323-24, 75 S. Ct. at 376 (Frankfurter, J., concurring in the result). As our analysis below indicates, Congress has expressed an affirmative intent, as far as civilians are concerned, to preserve state law remedies in territorial waters. *See infra* at typescript 37-38.

35. The rule that the Jones Act preempts state remedies stems from *Lindgren* and *Gillespie* (which held that the Jones Act was the exclusive remedy for survivors of seamen killed in territorial waters). These cases may not have survived *Moragne*, *see* GILMORE & BLACK § 6-32, at 368 (saying that *Moragne* effectively overruled *Lindgren* and *Gillespie*), although in *Miles* the Court suggested that at least with respect to the issue of the preemption of state remedies, *Lindgren* and *Gillespie* are still good law. *See Miles*, 498 U.S. at 29, 111 S. Ct. at 324 ("[T]he preclusive effect of the Jones Act established in *Lindgren* and *Gillespie* extends only to state remedies . . . ." (citing *Moragne*, 398 U.S. at 396, n.12, 90 S. Ct. at 1785 n.12). At all events, the premise of Yamaha's argument that the federal statutes displace all state remedies is not free from doubt, even where the federal statutes apply.

importance of "uniformity" in admiralty law and stressed the preeminence of federal maritime law over state law rules of decision. *See Jensen*, 244 U.S. at 216, 37 S. Ct. at 529.[36]

But unlike the situations in *Tallentire*, *Higginbotham*, and *Miles*, each of which implicated clearly articulated federal statutory schemes, the *Moragne* cause of action in this context reflects anything but a clearly articulated scheme. Not only has Congress said nothing about the applicability of particular remedies, but the Court's common law has not either. And since *Moragne* explicitly left open a number of questions about remedies, application of state remedies remains permissible to the extent they do not conflict with whatever settled principles exist.[37] This proposition is true

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36. Of course Justice Holmes dissented in *Jensen*, uttering what is perhaps his best known statement: "The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi sovereign that can be identified." 244 U.S. at 222, 37 S. Ct. at 531 (Holmes, J. dissenting). And *Jensen* has since been called the *Lochner* of the federal maritime law. *See American Dredging*, 114 S. Ct. at 991 (Stevens, J. concurring) ("*Jensen* is just as untrustworthy a guide in an admiralty case today as *Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539 (1905), would be in a case under the Due Process Clause.") (parallel citation omitted).

37. Although Yamaha has been able to muster considerable support in the case law for its position that *Moragne* displaces all state wrongful death statutes, the case law appears to be split on this issue. *Compare Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4 F.3d 1084, 1089 (2d Cir. 1993) (citing cases); *Nelson v. United States*, 639 F.2d 469, 473 (9th Cir. 1980); *Choat v. Kawasaki Motors Corp.*, 1994 A.M.C. 2626 (Ala. 1994); *Texaco Ref. & Mktg., Inc. v. Estate of Dau Van Tran*, 808 S.W.2d 61 (Tex. 1991) (holding that *Moragne* displaces state wrongful death and survival statutes), *cert. denied*, 112 S. Ct. 301 (1991), *with Ellenwood v. Exxon Shipping Co.*, 984 F.2d 1270, 1280 n.12 (1st Cir. 1993) ("Even today, plaintiffs may invoke state wrongful death statutes under the saving clause insofar as they involve accidents in territorial waters and do not conflict with the substantive principles developed under the maritime wrongful death doctrine."), *cert. denied*, 113 S. Ct. 2967 (1993); *Lyon v. Ranger III*, 858 F.2d 22, 27 (1st Cir. 1988) (Breyer, J.) (applying Massachusetts state law as its rule of decision in wrongful death action brought by survivor of person killed in a scuba accident within Massachusetts territorial waters). *Cf. Favorito v. Pannell*, 27 F.3d 716

whether state laws operate to plaintiffs' or defendants' benefit. *See, e.g., Brockington v. Certified Elec., Inc.*, 903 F.2d 1523, 1528-33 (11th Cir. 1990) (per curiam) (applying exclusivity provisions of Georgia Worker's Compensation Act to *exclude* additional recovery under general federal maritime law to nonmaritime worker injured within territorial waters), *cert. denied*, 498 U.S. 1026, 111 S. Ct. 676 (1991).

Prior to *Moragne*, it was well established that state wrongful death statutes could apply to maritime deaths occurring in territorial waters. *Lindgren*, 281 U.S. at 43-44, 50 S. Ct. at 210 ("[Before the Jones Act], in the absence of any legislation by Congress, . . . where a seaman's death resulted from a maritime tort on navigable waters within a State whose statutes gave a right of action on account of death by wrongful act, the admiralty courts could entertain a libel in personam for the damages sustained by those to whom such right was given.");[38] *Garrett v. Moore-McCormack Co., Inc.*, 317 U.S. 239, 245, 63 S. Ct. 246, 251 (1942) ("[A]dmiralty courts, when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with the substantive law of the State."); *The Tungus*, 358 U.S. at 590-91, 79 S. Ct. at 505-06 (pre-*Moragne* rights of non-seaman killed in state territorial waters depend on state wrongful death statute).[39]

(1st Cir. 1994) (applying Rhode Island law to claims arising from allision of small boat with anchored vessel within Rhode Island's territorial waters and citing *Lyon*); *Marine Transp. Serv. v. Python High Performance*, 16 F.3d 1133 (11th Cir. 1994) (although recognizing that general maritime law was applicable to the claim under admiralty jurisdiction, nevertheless applying principles of Florida equitable estoppel law in commercial dispute).

38. *See also id.* at 44, 50 S. Ct. at 210 ("[S]such statutes 'were not a part of the general maritime law' and were recognized only because Congress had not legislated on the subject.").

39. This aspect of the holding of *The Tungus* retains vitality post-*Moragne*, for the *Moragne* Court "concluded that the primary source of the confusion [in the law of maritime wrongful deaths] is not to be found in *The Tungus*, but in *The Harrisburg*." *Moragne*, 398 U.S. at 378, 90 S. Ct. at 1776, only the latter of which *Moragne* accordingly overruled. *Id.* at 409, 90 S. Ct. at 1792.

Furthermore, *Moragne* itself showed no hostility to concurrent application of state wrongful death statutes. Indeed, to read into *Moragne* the idea that it was placing a ceiling on recovery for wrongful death, rather than a floor, is somewhat ahistorical. The *Moragne* cause of action was in many respects a gap filling measure to ensure that seamen (and their survivors) would all be treated alike. *Gaudet*, 414 U.S. at 596, 608 n.19, 94 S. Ct. at 820, 826 n.19 (Powell, J., dissenting). The "humane and liberal" purpose underlying the general maritime remedy of *Moragne* was driven by the idea that survivors of seamen killed in state territorial waters should not have been barred from recovery simply because the tort system of the particular state in which a seaman died did not incorporate special maritime doctrines. It is difficult to see how this purpose can be taken as an intent to preclude the operation of state laws that do supply a remedy.

Of course, as we have mentioned above, *Moragne* also recognized the importance of federal statutory commands in shaping the general maritime wrongful death remedy — both in the way in which it created a general maritime wrongful death remedy, and in its suggestion that courts should look to statutes for guidance in developing the contours of that remedy. And post-*Moragne* jurisprudence has given that principle preeminence. But a proper application of this principle, in our view, shows that state wrongful death statutes should not be displaced in this context. Our principal guidance on this issue comes from *Tallentire* and its interpretation of DOHSA, the one federal statute applicable to non-seamen.

Although *Tallentire* held that DOHSA displaced state wrongful death statutes for deaths on the high seas, its analysis of Section 7 of DOHSA is of considerable importance in understanding the extent to which the DOHSA remedies should not be treated as the exclusive types of remedies in a *Moragne* cause of action. Of decisional importance in *Tallentire* was the notion that by enacting Section 7 of DOHSA, Congress intended to preserve concurrent state jurisdiction for maritime deaths within state territorial waters. As we have discussed in the previous section, the Court stressed that the animating

purpose of Section 7 was to preserve to the states "jurisdiction to provide wrongful death remedies under state law for fatalities on territorial waters," and that "[b]ecause DOHSA by its terms extended only to the high seas and therefore was thought not to displace [state wrongful death remedies] on territorial waters, § 7, as originally proposed, ensured that the Act saved to survivors of those killed on territorial waters the ability to pursue a state wrongful death remedy in state court."[40] *Tallentire*, 477 U.S. at 225, 106 S. Ct. at 2495 (internal citation omitted). *Tallentire* thus tells us that DOHSA was affirmatively intended to preserve state wrongful death remedies for survivors of people killed in territorial waters. This intent to preserve state wrongful death remedies in state territorial waters should not be lightly disregarded, particularly since *Moragne* and its progeny say nothing explicit about abrogating state remedies.

Tallentire's interpretation of DOHSA is also important for another reason. It suggests that there is a more fundamental flaw in Yamaha's argument that the incorporation of DOHSA's provisions into a *Moragne* cause of action should be treated as displacing all state wrongful death remedies. If Yamaha is right, it means that *Moragne* gives DOHSA preclusive effect in an area (maritime deaths in state territorial waters) in which Congress explicitly intended DOHSA to have no such effect. *See The Tungus*, 358 U.S. at 608, 79 S. Ct. at 514 ("It is odd to draw restrictive inferences from a statute whose purpose was to extend recovery for wrongful death."). So interpreted, *Moragne* would thus transform a statute explicitly designed to preserve state remedies into one that would displace them. In our view, such a result would cut *Moragne* loose from its conceptual moorings and disregard Supreme Court teachings since *Moragne* that we must look to congressional

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40. *See also id.* ("The felt necessity for a DOHSA saving clause, then, may be traced to the fact that [state] wrongful death statutes like workmen's compensation schemes were not common law remedies, and thus may not have been deemed saved to suitors under the Judiciary Act of 1789, as construed in *Jensen*.") (internal quotation marks and citations omitted).

statutory commands to determine what remedies are available for maritime deaths.

But even if DOHSA is not treated as *explicitly* allowing state law to operate in this area, at the very least the legislative history of DOHSA shows no hostility toward the application of state wrongful death statutes in territorial waters. *See Gaudet*, 414 U.S. at 588 n.22, 94 S. Ct. at 816 n.22. And since a "clear conflict" must exist before state law is displaced by federal admiralty law, *see Askew*, 411 U.S. at 325, 93 S. Ct. at 1600, we cannot find that *Moragne* displaces state wrongful death remedies for deaths of non-seamen in territorial waters. Because we see no congressional intent to preclude the operation of state wrongful death statutes, and, indeed, believe that DOHSA arguably preserves state wrongful death remedies in territorial waters, we hold that state wrongful death statutes provide the rule of decision when a recreational boater is killed in territorial waters.

We find support for this result in Judge Breyer's opinion in *Lyon v. Ranger III*, 858 F.2d 22, 27 (1st Cir. 1988) (applying Massachusetts state law as its rule of decision in wrongful death action brought by survivor of person killed in scuba accident within Massachusetts territorial waters), and the views of a leading commentator, 14 Charles A. Wright et al., *Federal Practice and Procedure* § 3672 at 295 (2d ed. Supp. 1994) ("If the same accident [one falling within the provisions of DOHSA] occurs within a marine league from shore, where [DOHSA] has no effect, the survivors can recover damages under the state wrongful death statute, including, when provided, reimbursement for non-economic losses."). *Cf. Ballard Shipping*, 32 F.3d at 631 (holding that the federal maritime economic loss rule of *Robbins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927), which denies recovery for purely economic losses, did not displace a Rhode Island statute that allowed damages for some economic losses).

We also believe our holding to be in full accord with the principle of uniform vindication of federal maritime policies that, however attenuated, *see supra* at typescript 25-27, has generally been considered the hallmark of conflicts jurisprudence in admiralty law. In terms of the notion of

uniformity, Yamaha's claim basically boils down to the following proposition: state wrongful death statutes cannot apply to deaths to recreational boaters in territorial waters because it would raise the possibility of different remedies depending on the location of the accident and the citizenship of the parties.[41] But Yamaha "heralds the need for uniformity without an appreciation for the boundaries of its relevance." *Ellerwood v. Exxon Shipping Co.*, 984 F.2d 1270, 1279 (1st Cir. 1993). The argument simply proves too much. "All state laws, if given effect in admiralty cases, interfere to a degree with the uniformity of admiralty law." 1 BENEDICT ON ADMIRALTY § 112, at 7-36.

Perhaps recognizing that its uniformity argument proves too much, Yamaha advanced a variant of it at oral argument, suggesting that accepting the Calhouns' position on available damages would lead to the following allegedly untenable result: in an accident on a ship in which a non-seaman and a seaman were each killed, the non-seaman's survivors would potentially be entitled (depending on the state statute) to higher damages than those available to the survivors of the seaman. This result, however, is untenable only if we assume that a person's statutory status should be irrelevant for purposes of determining recovery for maritime deaths. But *Miles*, by denying loss of society damages to the survivor of a seaman because the seaman was covered by the Jones Act, has told us that such status does make a difference. 498 U.S. at 32-33, 111 S.Ct. at 325-26.[42]

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41. Yamaha states, in terrorem:

> The Calhouns argue against the weight of authority and against the concept of uniformity; instead they espouse a different remedy for civilians injured in territorial waters than that afforded seamen and maritime workers by Congress and the Supreme Court. If accepted, their argument would result in at least 50 different possible measures of damages for the same cause of action, depending solely on the citizenship of the decedent and/or the place of the accident.

Reply/Answering Brief of Appellants/Cross-Appellees at 1-2.

42. The case law is replete with statements that non-seamen should not be entitled to damages in greater amounts than seaman because allowing recovery would not foster admiralty's aim of providing special solicitude to seamen. *See, e.g., Wahlstrom*, 4 F.3d at 1092. But this argument seems to us to be a non sequitur, for it is difficult to see how denying recovery to non-seamen's survivors shows any special solicitude to seamen or their survivors.

More fundamentally, however, it is fairly common for tort systems to allow different recoveries based on the injured party's status. The problem Yamaha poses arises all of the time, whenever two parties are injured in the same event but one is covered by worker's compensation and the other is not. Even within maritime law, differing recoveries based on status occur all of the time. Longshoremen and seamen can often be injured in the same event, but a longshoreman covered by LHWCA, 33 U.S.C.A. §§ 901 *et seq.* (1986), cannot sue under the doctrine of unseaworthiness, while a seaman can.

A similar asymmetry exists between non-seamen and seamen where non-seamen cannot take advantage of the doctrine of unseaworthiness. *See Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 629, 79 S. Ct. 406, 409 (1959); *Gremillion v. Gulf Coast Catering Co.*, 904 F.2d 290, 294 n.11 (5th Cir. 1990). For instance, should a non-seaman and a seaman be injured due to a non-negligent but unseaworthy condition of the vessel, the seaman would recover and the non-seaman would not. This analogy has especial importance because in *Moragne* itself a negligence theory was at all times still available to the plaintiff.[43]

Indeed, this case is, in many respects, the mirror image of *Moragne*. *Moragne* was driven by the realization that the state wrongful death tort system simply could not be grafted wholesale onto the regime governing torts affecting seamen. 398 U.S. at 401, 90 S. Ct. at 1788 (stating that its holding would remove the "tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts"). To accept Yamaha's position in this case would create the opposite of the problem faced in *Moragne*, for we

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43. It is often a quite reasonable choice for a group of potential plaintiffs to give up the prospect of huge damages in return for easier theories of recovery, and vice versa. The trade-off that the longshoreman received in exchange for losing the right to sue on an unseaworthiness theory was an increase in the compensation benefits under the LHWCA and expanded coverage. *See* Gilmore & Black § 6-53, at 437 & n.339. More specifically, a trade-off similar to the one made in the context of longshore workers' injuries seems quite reasonable in the context of this case.

would be grafting a compensation scheme designed principally for seamen onto cases that fit easily within the tort systems developed by the states. This case is, at base, no different than a cause of action arising out of the average motor vehicle accident.

Finally, we note that states have substantial interests in policing their territorial waterways and protecting their citizens through their tort systems. In light of such interests, we should be loath to displace their statutes under our federal common law power absent a clear federal rule. *See American Dredging*, 114 S. Ct. at 992 (Stevens, J. concurring) (citing *Cippolone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992)). Although we recognize that the rule barring state claims if they conflict with basic maritime principles often requires a delicate accommodation of federal and state interests, here, in the absence of a clear federal interest, we think that the balance tips in favor of allowing state law to apply. In sum, we hold that general maritime law does not preempt state law wrongful death acts in actions based on the death of a nonseaman in territorial waters, and that such acts therefore govern this case.

V. CONCLUSION

For reasons we have explained above, before reaching the question certified by the district court it is necessary to determine what law governs this dispute, and the bulk of our opinion has been devoted to resolving that difficult question. We have concluded that whether loss of society, loss of support and services, future earnings, or punitive damages are available for the death of a non-seaman in territorial waters is a question to be decided in accordance with state law. We do not, however, reach the question of which state's law — Pennsylvania's or Puerto Rico's — applies. The district court did not consider that issue, and we decline to do so, preferring to have the district court address it in the first instance. Accordingly, we do not answer the certified question in terms. (As explained earlier, *see supra* at typescript 6-7, under Section 1292(b) we need not reach the certified question, but only decide the appeal from the challenged order.) We have, however,

given the district court sufficient guidance so that it may now do so with facility. Since the question of which state's law applies is plainly open, we will affirm the district court's order denying defendant's motion for summary judgment on loss of society and loss of support damages, but we will reverse the order granting defendant's motion for summary judgment on lost future earnings and punitive damages.

The parties shall bear their own costs.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 93-1736 and 93-1737

LUCIEN B. CALHOUN; ROBIN L. CALHOUN,
individually and as Administrators of the
Estate of Natalie K. Calhoun, deceased

v.

YAMAHA MOTOR CORPORATION, U.S.A.;
YAMAHA MOTOR CO., LTD.;
PALMAS DEL MAR COMPANY;
PALMAS DEL MAR, INC.; PALMAS YACHT CLUB, INC.;
MARINA DE PALMAS YACHT CLUB, INC.; MAXXAM
PROPERTIES, INC.; ABC CORPORATION; XYZ
PARTNERSHIP(S); CANDELERO
HOTEL CORPORATION;
MARINA DE PALMAS SHIPYARD, INC.

Yamaha Motor Corporation, U.S.A. and
Yamaha Motor Company, Ltd.,
Appellants in No. 93-1736

LUCIEN B. CALHOUN; ROBIN L. CALHOUN,
individually and as Administrators of the
Estate of Natalie K. Calhoun, deceased,

Appellants in No. 93-1737

v.

YAMAHA MOTOR CORPORATION, U.S.A.;
YAMAHA MOTOR CO., LTD.;
PALMAS DEL MAR COMPANY;
PALMAS DEL MAR, INC.;
PALMAS YACHT CLUB, INC.;
MARINA DE PALMAS YACHT CLUB, INC.; MAXXAM
PROPERTIES, INC.; ABC CORPORATION;
XYZ PARTNERSHIP(S);
CANDELERO HOTEL CORPORATION;
MARINA DE PALMAS SHIPYARD, INC.

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civ. No. 90-04295)

Present: Becker, Mansmann and Scirica, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on April 13, 1994.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court entered December 29, 1992, which was certified for immediate interlocutory appeal pursuant to 28 U.S.C. § 1292(b) by order entered June 3, 1993, which, in turn, was amended by order entered June 21, 1993, be and the same is hereby affirmed with respect to the denial of defendant's motion for summary judgment on loss of society and loss of support damages, but reversed with respect to the grant of defendant's motion for summary judgment on lost future earnings and punitive damages. The parties shall bear their own costs. All of the above in accordance with the opinion of this Court.

ATTEST:

P. Douglas Sisk

Clerk

Dated: November 2, 1994
Certified as a true copy and issued in lieu of a formal mandate on December 15, 1994

P. Douglas Sisk

Teste:
Clerk, United States Court of Appeals for the Third Circuit

Filed November 17, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 93-1736 and 93-1737

LUCIEN B. CALHOUN; ROBIN L. CALHOUN,
individually and as Administrators of the
Estate of Natalie K. Calhoun, deceased

v.

YAMAHA MOTOR CORPORATION, U.S.A.; YAMAHA MOTOR CO., LTD.; PALMAS DEL MAR COMPANY; PALMAS DEL MAR, INC.; PALMAS YACHT CLUB, INC.; MARINA DE PALMAS YACHT CLUB, INC.; MAXXAM PROPERTIES, INC.; ABC CORPORATION; XYZ PARTNERSHIP(S); CANDELERO HOTEL CORPORATION; MARINA DE PALMAS SHIPYARD, INC.,

Yamaha Motor Corporation, U.S.A. and Yamaha Motor Company, Ltd., Appellants in No. 93-1736

LUCIEN B. CALHOUN; ROBIN L. CALHOUN,
individually and as Administrators of the
Estate of Natalie K. Calhoun, deceased,

Appellants in No. 93-1737

v.

YAMAHA MOTOR CORPORATION, U.S.A.; YAMAHA MOTOR CO., LTD.; PALMAS DEL MAR COMPANY; PALMAS DEL MAR, INC.; PALMAS YACHT CLUB, INC.; MARINA DE PALMAS YACHT CLUB, INC.; MAXXAM PROPERTIES, INC.; ABC CORPORATION; XYZ PARTNERSHIP(S); CANDELERO HOTEL CORPORATION; MARINA DE PALMAS SHIPYARD, INC.

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civ. No. 90-04295)

Argued: April 13, 1994

Before: BECKER, MANSMANN and SCIRICA,
Circuit Judges.

(Opinion Filed November 2, 1994)

ORDER AMENDING OPINION

BECKER, *Circuit Judge.*

The opinion in the above-captioned case filed November 2, 1994 is amended as follows:

1. On page 4, first line under Part I, the words "with her parents" are deleted.

2. On page 15, the second sentence should now read:

> "The harshness of this rule prompted reaction from the federal judiciary and from Congress."

3. The word "nonpecuniary" is deleted on page 20, second line from bottom of page.

4. On page 30, footnote 29 should now read:

> We have alternated in our discussion between the terms "recreational boaters" and non-seamen, and we mean to use the terms interchangeably. We do not mean to intimate that crew members of a vessel such as a racing yacht should necessarily be treated differently than someone in Natalie Calhoun's position. The applicable remedy depends on whether such crew members fall within the Jones Act as seamen.

BY THE COURT,

/s/ Edward R. Becker
Circuit Judge

DATED: November 17, 1994

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 93-1736 and 93-1737

LUCIEN B. CALHOUN; ROBIN L. CALHOUN,
individually and as Administrators of the
Estate of Natalie K. Calhoun, deceased

v.

YAMAHA MOTOR CORPORATION, U.S.A.; YAMAHA MOTOR CO., LTD.; PALMAS DEL MAR COMPANY; PALMAS DEL MAR, INC.; PALMAS YACHT CLUB, INC.; MARINA DE PALMAS YACHT CLUB, INC.; MAXXAM PROPERTIES, INC.; ABC CORPORATION; XYZ PARTNERSHIP(S); CANDELERO HOTEL CORPORATION; MARINA DE PALMAS SHIPYARD, INC.

Yamaha Motor Corporation, U.S.A. and
Yamaha Motor Company, Ltd.,
Appellants in No. 93-1736

LUCIEN B. CALHOUN; ROBIN L. CALHOUN,
individually and as Administrators of the
Estate of Natalie K. Calhoun, deceased,

Appellants in No. 93-1737

v.

YAMAHA MOTOR CORPORATION, U.S.A.; YAMAHA MOTOR CO., LTD.; PALMAS DEL MAR COMPANY; PALMAS DEL MAR, INC.; PALMAS YACHT CLUB, INC.; MARINA DE PALMAS YACHT CLUB, INC.; MAXXAM PROPERTIES, INC.; ABC CORPORATION; XYZ PARTNERSHIP(S); CANDELERO HOTEL CORPORATION; MARINA DE PALMAS SHIPYARD, INC. (D.C. Civ. No. 90-04295)

Present: SLOVITER, *Chief Judge,* BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, MC KEE and SAROKIN, *Circuit Judges.*

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING IN BANC

The petition for rehearing filed by Appellant/Cross-Appellees, having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT:

Circuit Judge

DATED: December 7, 1994

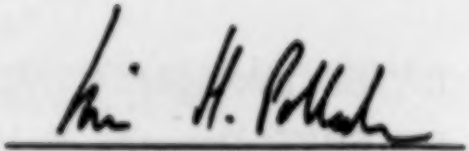
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYVANIA

LUCIEN B. CALHOUN and ROBIN L. CALHOUN, et al.	:	CIVIL ACTION NO. 90-4295
v.	:	
YAMAHA MOTOR CORPORATION U.S.A., YAMAHA MOTOR CO. Ltd, et al.	:	

ORDER

1. For the reasons stated from the bench on March 13, 1992, I find that this case falls within the Court's admiralty jurisdiction. Therefore, it is hereby ORDERED that the aspect of Defendants' Motion for Partial Summary Judgment requesting a declaration that Plaintiffs' right to recovery, if any, shall be determined under the law of admiralty, is GRANTED.

2. Resolution of the remaining issues raised by Defendants' Motion for Partial Summary Judgment is CONTINUED pending rebriefing by the parties. The parties are DIRECTED to SUBMIT their additional briefs to the Court by April 3, 1992. Any response to the opposing party's brief shall be due on April 15, 1992.



POLLAK, J.

DATED: March 16, 1992

ENTERED: March 19, 1992

Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LUCIEN B. CALHOUN and ROBIN L. CALHOUN, Individually and as Administrators of the Estate of Natalie K. Calhoun, deceased	:	Civ. No. 90-4295
v.	:	
YAMAHA MOTOR CORPORATION, USA, ET AL	:	

ORDER

For the reasons given in today's (December 24, 1992) bench opinion, it is hereby ORDERED that the motion of the Yamaha defendants for partial summary judgment on certain damage claims is:

(1) DENIED with respect to plaintiffs' claims for (a) damages for loss of support and services and (b) damages for loss of society; and

(2) GRANTED with respect to plaintiffs' claims for (a) damages for loss of future earnings and punitive damages.

Louis H. Pollak

Pollak, J

DATED: December 24, 1992

ENTERED: December 29, 1992

Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LUCIEN B. CALHOUN and ROBIN L. CALHOUN, Individually and as Administrators of the Estate of Natalie K. Calhoun, deceased	:	Civil Action
v.	:	
YAMAHA MOTOR CORPORATION, USA, ET AL	:	No. 90-4295

OPINION*

POLLAK, J. June 17, 1993

This is a suit brought by the plaintiffs Lucien and Robin Calhoun, proceeding individually and also in their capacities as administrators for the estate of their daughter, Natalie Calhoun, against the defendants, Yamaha Motor Corporation, U.S.A. and Yamaha Motor Company Ltd., which are respectively a California corporation and a corporation organized under the laws of Japan. Numerous other corporations and partnerships are listed as defendants, but they are not before the court.

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* This is a transcript, which has been slightly edited for clarity, of an opinion delivered from the bench on December 24, 1992.

The plaintiffs are citizens of Pennsylvania, so their claims invoke this court's diversity jurisdiction. In addition, the complaint invokes the admiralty and maritime jurisdiction of this court.

The controversy arises out of tragic events that took place on the 6th of July, 1989 when plaintiffs' daughter, Natalie, was killed in an accident in the waters of Puerto Rico, right off the shore of Palmas del Mar Resort, Humacao, Puerto Rico. Natalie Calhoun and a young friend of hers, both teenagers, had rented a jet ski at the resort hotel at which they were staying with their families. And Natalie, on the rented jet ski, slammed into a vessel in the waters off the hotel frontage, and she was killed.

The suit brought in this court sets forth numerous causes of action, all of them subsumed under the Pennsylvania wrongful death and survival statutes.

The various claims that relate to the two Yamaha defendants, which for purposes of simplicity I'll simply refer to in the singular as Yamaha, sound in negligence as to one count; in strict liability, under Sections 402A and 402B of the Restatement of Torts, as to two additional counts; and, as to implied warranties of merchantability and fitness, two additional counts.

What is before the court is a motion for partial summary judgment. In that motion, Yamaha seeks dismissal of certain damage claims: In particular, Yamaha contends that there is no basis in the legal principles which Yamaha contends are applicable to this case, under which recovery can be had for lost future earnings of Natalie Calhoun, a claim which would be an aspect of the survival action prosecuted on behalf of Natalie Calhoun's estate. Further, Yamaha contends that with respect to the wrongful death claim asserted by the plaintiffs individually, as parents of Natalie, the claimed damages for loss of support and loss of society cannot be sustained as a matter of law. Finally, Yamaha contends that claims for punitive damages, whether under the banner of a wrongful death action or a survival action, cannot be maintained.

Now, an initial question, which in some substantial measure sets the framework for what sources of law govern this

case, is whether this case is properly within the admiralty and maritime jurisdiction of this court or whether it is here only on the basis of diversity of citizenship.

As noted, the first amended complaint invokes this court's jurisdiction on both bases. If it be the case that this case is before the court solely as a diversity matter, then it would appear that the only claims which could be entertained by this court would be claims arising under the Pennsylvania statutes referred to, that is to say, the Pennsylvania wrongful death and survival statutes expressly invoked by the complaint. That is to say, if this case, for jurisdictional purposes, is simply a diversity case, notwithstanding that the complaint invoked both diversity and admiralty, then this case should be treated as any other diversity case in which basically the questions of choice of law, whether as to the substantive ingredients of asserted causes of action or the remedies, including damage remedies that would be assertable, would be questions that would be determined by this court on the basis of its determination of what a Court of Common Pleas of Pennsylvania would do with respect to a case in exactly the same posture being brought there. That is to say, the principles of *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938), and *Klaxon v. Stentor,* 313 U.S. 487 (1941), would call for this court to follow the rules of the Pennsylvania courts as faithfully as possible.

If this case is also here as an admiralty matter, then, in the view of Yamaha, the Pennsylvania statutes are ousted and the extent of the plaintiffs' claims, both substantively and as a remedial matter, would be determined entirely by reference to the federal maritime standards originating in *Moragne v. States Marine Lines,* 398 U.S. 375 (1970), and developed in later cases, most particularly *Sea-Land Services v. Gaudet,* 414 U.S. 573 (1974), *Mobil Oil Corporation v. Higginbotham,* 436 U.S. 618 (1978), *Offshore Logistics v. Tallentire,* 477 U.S. 207 (1986), and *Miles v. Apex Marine,* 111 S. Ct. 317 (1990).

The plaintiffs respond in three ways. First, they have insisted that this is not a case on the admiralty side of the docket.

Second, plaintiffs take the position that even if it is an admiralty case, as well as a diversity case, the Pennsylvania statutes are applicable and indeed controlling.

And, third, the plaintiffs take the Position that, even if the Pennsylvania statutes do not apply of their own force, the federal maritime claim would embrace the various damage claims challenged by the defendant, Yamaha.

Now with respect to whether this is a case to be treated solely as a diversity matter or to be recognized as an admiralty case, it is, of course, true, that the plaintiffs in drafting their complaint, invoked both elements of this court's jurisdiction. However, the fact that the plaintiffs, as a matter of pleading, may at some point have asserted a particular jurisdictional ground cannot be regarded as estopping them from taking a different position with respect to jurisdiction. Perhaps, to put it another way, this court is not in a position with respect to an issue of jurisdiction to say we must have admiralty jurisdiction even if the plaintiffs now challenge it, since at an earlier stage they claimed it; that is so because, unlike most other issues in litigation, subject-matter jurisdiction is not waivable. If a federal court lacks subject-matter jurisdiction, it is obligated to dismiss, no matter at what stage that deficiency was determined. So I regard the question of whether this case is solely on the diversity side of the docket, or here both on diversity and as an admiralty matter, as a question which is open and properly to be determined.

Having said that, I must add that the very issue is one that I have already addressed in a preliminary ruling, a bench opinion delivered on March 13, 1992. At that time, I decided that this case, involving a collision between a jet ski and a conventional vessel in navigable waters, albeit territorial navigable waters, fell within the admiralty jurisdiction; that seemed to me the necessary implication of the cases beginning with *Executive Jet Aviation v. City of Cleveland,* 409 U.S. 249 (1992), that have considered this jurisdictional issue over the past quarter century. Further consideration has not changed my mind.

I conclude that *Sisson v. Ruby,* 497 U.S. 358 (1990), the most recent expression by the Supreme Court that goes to

defining the ingredients of admiralty jurisdiction, is confirmatory of my thinking as expressed last March. And, so too, is the reasoning of the Texas Supreme Court in *Texaco Refining v. Estate of Dau Van Tran,* 808 S.W.2d 61 (Tex. 1991), which the United States Supreme Court declined to review on certiorari. That case is of particular interest because it is one which in certain of its elements is quite like the present case. It was a suit arising out of the death of a person who was crushed by a shrimp boat that was close to a dock, when a great wave, assertedly precipitated by a Texaco tanker going too fast, washed ashore, pushing the shrimp boat against the dock. The case was unlike this one in that it was brought in the state courts of Texas. The state courts at trial and on appeal to the Texas Court of Appeals treated the case as a state law case arising under the Texas wrongful death and survival statutes. The Supreme Court of the United States granted certiorari to the Texas Court of Appeals. The case was not in its first go-round reviewed by the Texas Supreme Court. In granting certiorari, the United States Supreme Court vacated and remanded for further consideration in the light of *Sisson.* On remand, the Texas Court of Appeals praised *Sisson* but concluded that it did not dictate a conclusion that the suit arising out of the death of Dau Van Tran fell within admiralty jurisdiction. And so the Texas Court of Appeals reaffirmed its original affirmance of the judgment for plaintiff based on state law.

The Texas Supreme Court, in the opinion I referred to, 808 S.W.2d 61, reversed and concluded that the case did indeed, pursuant to *Sisson* and also *Foremost Insurance Company v. Richardson,* 457 U.S. 668 (1982), fall within the admiralty jurisdiction.

As a corollary of its jurisdictional determinations, the Texas Supreme Court went on to make determinations as to what was recoverable, taking the case as an admiralty case, and concluded that certain items of damages, particularly loss of society, that had been granted by the trial court and the award of which was sustained by the Texas Court of Appeals were not appropriate. To that aspect of *Dau Van Tran,* we will return shortly. For the moment I refer to *Dau Van Tran* sim-

ply with respect to its holding as to jurisdiction. Agreeing with the Supreme Court of Texas' determination on the jurisdictional side, I see that case as supporting my initial determination that this is an admiralty matter. Confirmatory of this conclusion is a case more recent than my March determination, the decision of the District Court of the Southern District of Florida in *Cantore v. Blue Lagoon,* No. 91-10014 (Sept. 9, 1992). The district court, without directly addressing the jurisdictional question, focused on the scope of the federal maritime claim, which was found to have arisen out of a collision between two jet skis in the waters off Key West, Florida.

I proceed, therefore, on the basis that this is a case on the admiralty side. It is, to be sure, also a diversity case. Given this jurisdictional duality, the first question to be addressed is whether the Pennsylvania statutes invoked by the plaintiffs govern this case.

Here, the plaintiffs place substantial reliance on *Dugas v. National Aircraft Corporation,* 438 F.2d 1386 (3d Cir. 1971), a case decided by the Third Circuit in 1971 following the Supreme Court's decision in *Moragne.* I referred to *Moragne* before but have not noted its importance except to say that it is the initiation of the modern jurisprudence of the federal maritime action for wrongful death.

Moragne overturned the Supreme Court's unhappy decision in *The Harrisburg,* 119 U.S. 199 (1886). That case announced that there is within admiralty no cause of action for wrongful death. A clain for wrongful death in the navigable waters of the United States could come about under the Supreme Court's ruling in *The Harrisburg* only pursuant to a statute establishing a wrongful death claim, a statute which might be the handiwork of Congress or the handiwork of one of the states of the Union. In the absence of such statutory basis, *The Harrisburg* declared that a death, however wrongful, was unremediable if it took place on the navigable waters. That unhappy result was partly remedied in 1920 by the Death on the High Seas Act, 47 U.S.C. §§ 761-768, which created a wrongful death action for deaths on the high seas, which is to say outside the three-mile limit which separates the territorial waters from what Congress has denominated the high seas.

The Death on the High Seas statute provided for recovery for wrongful death with damages generally speaking confined to those of a pecuniary nature.

In addition to that general legislation, Congress passed legislation that addressed particular categories of persons who are in some sense regarded by the law as wards of the United States; seamen are governed by the Jones Act, 47 U.S.C. § 688, which, in effect, replicates for seamen the negligence cause of action and associated remedies, again of an essentially pecuniary nature, that Congress provided in the Federal Employers' Liability Act, 45 U.S.C. §§ 51-59, for railway workers; and the Longshoremen and Harbor Workers Act, 33 U.S.C. §§ 901-950 governing longshoremen.

Moragne, fifty years after the enactment of the Death on the High Seas Act, overturned *The Harrisburg.* The Supreme Court made it reasonably clear that *The Harrisburg* may very well have been wrong when announced but in any event grew only more anomalous with age.

The *Moragne* case, which itself arose in territorial waters, was addressing a claim not governed in terms by the Death on the High Seas Act. The Supreme Court concluded that it had authority to construct a judicial remedy for wrongful death in an area not expressly governed by federal legislation. *Moragne,* in effect, announced a federal maritime action for wrongful death but did not undertake to spell out all the ingredients of that new cause of action.

The first subsequent Supreme Court examination of the *Moragne* cause of action was in *Gaudet* four years later. *Gaudet* dealt with the death of a longshoreman in the territorial waters of Louisiana. The Supreme Court in *Gaudet* decided that an action brought by the decedent's widow[2] — a survival action based on unseaworthiness — was an appropriate claim under the *Moragne* maritime action concept. The decision was greatly complicated by the fact that the decedent had himself sued in his own right, when gravely injured, and the litigation

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2. From the bench, I incorrectly stated that the decedent's "mother" brought the survival action in *Gaudet.* This misstatement would not appear to affect the bearing of *Gaudet* on the present case.

proceeded up through the time of his death. That aspect of duality raised difficult procedural problems; however, it did not bear on the aspects of *Gaudet* that are important for our purposes.

Gaudet, dealing with a case within the territorial waters yet arising out of the death of a longshoreman, not a person with respect to whom Congress had not legislated at all, authorized the widow's wrongful death action under *Moragne* and sustained a damages claim for loss of society. In the course of the *Gaudet* opinion, the Court had occasion to refer, with apparent approval, to cases in which a federal maritime claim was joined with a state claim. An example cited in footnote 24 of *Gaudet* was the Third Circuit's decision in *Dugas*, the 1971 case to which I have referred. In that case, the Third Circuit, pre-*Gaudet*, had sustained a claim based jointly on the Death on the High Seas Act and on the Pennsylvania survival statute. It was a case which arose out of a flight starting in the Bahamas, heading toward Puerto Rico, with the plane lost en route.

Gaudet, on its face, appears to approve of the application of state statutes. *Gaudet* thus might be regarded as encouraging the concept that in a case such as the present one in which there is no directly applicable federal statute — a case arising in territorial waters and not relating to the death either of a seaman or a longshoreman — state statutes, whether wrongful death statutes or survival statutes, could have direct application.

The *Gaudet* case was a case in which the Supreme Court was closely divided, unlike *Moragne*, which was unanimous.

What *Gaudet* augured for the future was a matter of very considerable concern for the bar and for the commentators. In a characteristically brilliant discussion in the leading admiralty treatise, Professors Gilmore and Black, in 1975, just a few months after *Gaudet* had been decided, said: "The *Gaudet* majority may seem to have been somewhat precariously constituted. The reader will be in a better position than the writer is to have an opinion on whether *Gaudet* is a case for all seasons or merely a winter's tale. *G. Gilmore and C. Black, The Law of Admiralty,* 370 (2d ed. 1975).

In the cases subsequent to *Gaudet*, the Supreme Court has narrowed *Gaudet* to the precise field of its own operation. That is to say, subsequent Supreme Court decisions have stressed that *Gaudet* was a case (a) that dealt with a longshoreman's death and (b) that dealt with a longshoreman's death in territorial waters, notwithstanding that the opinion of Justice Brennan for the majority in *Gaudet* placed no weight at all on the locus of the accident and no particular weight on the fact that the decedent was a longshoreman.

With respect to the particular issue of whether — as the Third Circuit suggested in *Dugas*, and the court in *Gaudet* seemed obliquely to acknowledge — a state statute can be joined with an applicable federal remedy, the Supreme Court decisions post-*Gaudet* would appear to have cast some doubt on that sort of a conjunction. Thus, in *Mobil Oil v. Higginbotham*, which was decided in 1978, four years after *Gaudet*, the Court held in an opinion by Justice Stevens, that in a case arising on the high seas — a case not involving a seaman, but arising out of the death of persons in a helicopter crash, offshore and beyond the territorial waters — the relevant recovery was framed by DOHSA, the Death on the High Seas Act, and that precluded any recovery for loss of society, the damage claim recognized by the Court in *Gaudet*. In short, the Court in *Mobil Oil* decided that in a case falling directly within the realm in which congress has legislated, it was not open to the Court to authorize supplementary relief that went beyond the pecuniary damages contemplated by DOHSA.

Mobil oil was followed eight years later, in 1986, by *Offshore Logistics v. Tallentire*. That was a somewhat similar case in that again the deaths were a result of a helicopter crash offshore and beyond the territorial waters. Once again, the basic claim which invoked federal jurisdiction was one under DOHSA and conjoined to it was a claim under the Louisiana wrongful death statute.

The Court in *Tallentire* said the Louisiana statute was without application, and that DOHSA by its own terms was controlling with respect to what relief was recoverable. In particular, a claim for loss of society under the Louisiana wrongful death statute could not be asserted successfully notwith-

standing the so-called "saving to suitors clause" in Section 7 of DOHSA. That clause, notwithstanding the apparent ordinary meaning of its words, did not preserve state causes of action in suits arising on the high seas but simply preserved state court jurisdiction to prosecute the federal claim defined by DOHSA.

Four members of the Court dissented from Justice O'Connor's opinion in *Tallentire*,—but the dissent went to the question of construction of Section 7 of DOHSA and it does not bear directly on the issues before us. There also had been a dissent by two members of the Court in the *Mobil Oil* case, but again the dissent does not really affect the basic line of jurisprudential development addressed here.

The suit brought here is not a suit that relies in any part on DOHSA or on the Jones Act, or on the Longshoremen and Harbor Workers' Act. None of the federal statutes that deal directly with injuries or death in the navigable waters of the United States applies to a case in which the death precipitating the litigation took place in the territorial waters of the United States — that is to say, not on the high seas — and in which the decedent was not a seaman and was not a longshoreman.

Now, given that, is it not arguable that the preclusive thrust of cases such as *Mobil Oil* and *Tallentire* offers no guidance? There is very strong support from eminent authority for the proposition that *Mobil* and most particularly *Tallentire* do not speak to the problem before this court. Professors Wright, Miller and Cooper in Section 3672 of their treatise — I'm referring now to the 1992 Supplement — have this to say in their discussion of *Tallentire*:

> Despite the Court's stated solicitude with regard to forum choice for survivors of those killed on the high seas, the actual holding of Offshore Logistics which addressed a conflict that had developed among the Courts of Appeals as to the substantive effect of the Death on the High Seas Act, resolved that conflict against the interests of most survivors. Prior to Offshore Logistics, several lower courts had held that the first sentence of Section 7 of the Act preserved not only concurrent jurisdiction, but

> also any remedies provided by the state wrongful death statutes, many of which, unlike the federal statute, provide for non-pecuniary losses. Indeed, a literal reading of the statute, which states that it shall not affect the provisions of any state statute "giving or regulating rights of action or remedies for death" would appear to support this view. Nonetheless, in Offshore Logistics, the Court held that when an accident falls within the provisions of the Act, state wrongful death statutes are preempted. Thus, although survivors of a person killed in an accident on the high seas have a choice of forum, they may seek only the limited recovery provided by the Death on the High Seas Act. If the same accident occurs within a marine league from shore, where the Death on the High Seas Act has no effect, the survivors can recover damages under the state wrongful death statute, including, when provided, reimbursement for- non-economic losses.

C. A. Wright, A. R. Miller & E. H. Cooper, *Federal Practice and Procedure*, Section 3672 (Supp. 1992) (footnotes omitted).

If Professors Wright, Miller and Cooper are correct — and they almost always are — the plaintiffs in the case before this court would seem to have substantial ammunition in contending for the proposition that at least some categories of nonpecuniary damages can be asserted either under a wrongful death statute or a survival statute. The thrust, nonetheless, of the post-*Gaudet* cases, including *Tallentire*, seems to me to run not in direct holding but in jurisprudential approach contrary to the inference drawn by Professors Wright, Miller and Cooper. That is to say, the Supreme Court's post-*Gaudet* jurisprudence seems to me cumulatively to run *against* a conclusion that state statutes can of their own force have some share in defining what a cause of action may be which arises from a death in the navigable waters, whether on the high seas or on the territorial waters and without regard to whether the decedent is a seaman or a longshoreman on the one hand or a civilian on the other.

In *Mobil Oil*, the Court, speaking through Justice Stevens, recognized that its determination that no claim for loss of society was assertable in a case arising on the high seas,

where DOHSA was applicable, would result in a different and narrower range of potential recovery than if the case had arisen in territorial waters and hence had been governed by *Gaudet*. The *Mobil Oil* Court did not propose to disturb *Gaudet* but it confined *Gaudet* to its geographic bounds. In so doing, the Court noted in footnote 18, at page 624 of 436 U.S., "The only disparity that concerns us today is the difference between applying one national rule to fatalities in territorial waters and a slightly narrower national rule to accidents farther from land."

What I think is clear from Justice Stevens' identification of the two "national rules" is that the Court saw not merely the DOHSA claim but the *Gaudet* claim, which potentially was a more favorable one for the plaintiff, as claims of national architecture. The one was a statutory claim, the DOHSA claim. The other, a judicially created one. To that extent, I think Mobil oil carried on what was essentially the central logic of *Moragne* and *Gaudet* themselves — the understanding that the Supreme Court was authorizing the creation of a federally judicially defined cause of action, one which possibly would draw on state law sources but not because state law sources held any direct primacy.

The same jurisprudential thrust, so it seems to me, is to be found in Justice O'Connor's opinion in *Tallentire*. Justice O'Connor starts out the penultimate paragraph of the opinion by saying, "Admittedly in the circumstances of this case, the recognition of a state damages remedy for loss of society would bring respondents' DOHSA recovery into line with the damages available to a beneficiary of a federal *Moragne* maritime cause of action arising from a death on territorial waters. *See Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974) (holding that awards under the general federal maritime cause of action for wrongful death could include compensation for loss of society). However, the questionable practical significance of this difference in recovery, *see Mobil Oil Corp. v. Higginbotham, supra*, 436 U.S. at 624 and n. 20, is far overshadowed by the potential for serious conflicts between

DOHSA and state substantive law in such areas as limitations periods, classes of beneficiaries, and the definition of potential defenses." 477 U.S. at 233.

Justice O'Connor for the *Tallentire* majority echoes Justice Stevens for the majority in *Mobil Oil* in recognizing that what is in balance is a national statutory claim on the high seas as against a national judicially created maritime action in the territorial waters.

To recapitulate this portion of the opinion, my conclusion is that whatever recovery may be had for a death befalling someone who is not a seaman and not a longshoreman in territorial waters is dictated by a *national* and hence *uniform* federal maritime claim.

Now, having said that, I do not mean to suggest that the fleshing out of what a federal maritime action looks like ignores state law; to the contrary, the Court has made it clear as recently as *Miles v. Apex* — a case that is chronologically subsequent to *Mobil Oil* and *Tallentire* — that the contours of state statutes constitute very important ingredients of the doctrinal data that the Supreme Court looks to in defining the federal maritime action. Thus, in *Miles*, one of the major issues was whether the maritime cause of action could include a survival claim. Without deciding that issue, the Court said that if there were a survival ingredient in a federal maritime action, it would not include a claim for future earnings, and one of the reasons for that conclusion was that only a minority of the states endorse loss of future earnings as an element of survival actions.

Now, to be sure, the *Miles* Court saw other reasons for foreclosing a claim for loss of future earnings, and *Miles* was not a case like ours. The decedent in *Miles* was a seaman and so the Court saw weight in the fact that the Death on the High Seas Act and the Jones Act — one offering geographic definition; and one offering occupational definition — both foreclose noneconomic damages. However, the discipline of the *Miles* Court in considering the bearing of state law in the fashioning of a maritime action — even though in the particular case it concluded that the lesson of state law was not to authorize the particular damage claim because only a minority

of states gave survival recoveries for future earnings — seems to me instructive that in this area of defining a federal maritime action state law is regarded by the Supreme Court as of consequence. At the same time, it should be recognized that what is of consequence to the Court is not the particulars of a particular state statute generated by the legislature of a state which may happen to be reasonably adjacent to the accident.[3] What the Court is concerned about is the generality of state laws and what the majority rules seem to be.

In short, the Supreme Court has recognized state law — not the law of individual states but the various laws of the states of a wrongful death and survival nature — as bearing on its architecture of the uniform national federal maritime action.

Treating the case before us then as a federal maritime action, what are its components? I begin by addressing the question of the recoverability of future earnings. I have pointed out that in *Miles* the Court concluded that there was to be no recovery for future earnings. I have also noted that the *Miles* case is not squarely our case because it did involve a seaman and the Court clearly gave weight, in 111 S. Ct. at 327-28, to the fact that the Jones Act, addressing actions aris-

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3. Having referred to statutes of states that are reasonably adjacent to the accident, I should add that there may seem something anomalous about a contention, which, of course, is central to the plaintiffs' argument in favor of the applicability of Pennsylvania statutes, that they should have application at all to an accident happening right off the beach in Puerto Rico. In a formal sense one might wonder if Pennsylvania could have jurisdiction to legislate about such a matter. At the same time it is to be remembered that in *Dugas* the Third Circuit held the Pennsylvania survival statute applicable to the disappearance of an airplane in the Caribbean en route from the Bahamas to Puerto Rico. One might argue that all states have, subject to federal preemption, an equal right to legislate with respect to matters on the high seas but have less entitlement to legislate with respect to matters in the territorial waters of another state. In this case, the plaintiffs seek to apply Pennsylvania law to what may be characterized as a Puerto Rico accident. But in choice-of-law terms it seems reasonable to say that Pennsylvania's claim of interest here is not markedly dissimilar from its claim of interest in a case like *Dugas*. Its claim of interest arises from the fact that the decedent and her parents were Pennsylvania residents. So in that sense the contours of the damage claim have some importance to Pennsylvania.

ing from the death of a seaman, focused on pecuniary damages but in that framework did not contemplate recovery beyond "... losses suffered during the decedent's lifetime." 111 S. Ct. at 328. So that one ingredient of the *Miles* ruling was one which was anchored in the limitations with respect to recovery for the deaths of seamen that Congress had insisted upon.

However, as I have noted, another aspect of the Court's discussion stresses that loss of future income as an element of a survival action is disfavored by the states as a whole. "In only a few States can an estate recover in a survival action for income decedent would have received but for death .... The considered judgment of a large majority of American legislatures is that lost future income is not recoverable in a survival action. Were we to recognize a right to such recovery under maritime law, we would be adopting a distinctly minority view." 111 S. Ct. at 327.

Justice O'Connor goes on to note that there are good policy reasons for recognizing such a form of recovery but ultimately concludes that it would be inappropriate to include what in effect would be a minority ingredient not endorsed by Congress itself in the enactment of the Jones Act in fashioning the general maritime cause of action.

Given the Court's approach in *Miles*, I conclude that the Court would not in a case such as our own, in which it would be fashioning without statutory assistance a federal maritime claim, include in its survival-action aspects — assuming for purposes of discussion that the Court would conclude that the federal maritime action could include survival-action aspects a claim for loss of future earnings.[4] So, with respect to that claim for damages, I will grant defendant's motion for partial summary judgment.

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4. Given my view that the federal maritime cause of action is perceived by the Court as a claim of uniform national design, the fact that loss of future earnings may be available under the Pennsylvania survival statute, *see, e.g., Bariness v. Gladfelter,* 448 A.2d 1386, 1389 (Pa. Super. 1982), does not provide a basis for permitting a claim for loss of future earnings in this case notwithstanding Pennsylvania's interest in the decedent and her parents.

With respect to the claim for loss of society, once again the defendant, Yamaha, relies heavily on *Miles*. In *Miles*, as we have noted, the Court concluded that a claim for loss of society was not available in an action based on the death of a seaman.

Yamaha also places very heavy reliance on the decision of the Texas Supreme Court, to which I have already referred, and which is one year subsequent to *Miles*, namely *Dau Van Tran*. I have discussed that case in relation to its jurisdictional determination and I have noted that, having concluded that the case should be regarded as an admiralty case, the court went on to determine that, pursuant to *Miles*, "loss of society is not recoverable under general maritime law." *Dau Van Tran*, 808 S.W. at 63.

In short, the Texas Supreme Court drew from *Miles* a rule that would govern the case before the Texas court, which involved, as does the case before this court, the death of someone who was not a seaman as in *Miles*, nor a longshoreman as in *Gaudet*.

In relying on *Dau Van Tran*, Yamaha points out not simply that this is a decision by an appellate court on the very issue presented here. Yamaha also points out that this is a case which the Supreme Court of the United States had already considered, having granted certiorari to vacate the initial Texas Court of Appeals decision that the case was one arising under Texas law. Yamaha's position is that since on remand the Texas Court of Appeals adhered to its original position and then was reversed by the Texas Supreme Court and the United States Supreme Court then denied certiorari, we can take this as implicitly a determination by the United States Supreme Court that the Texas Supreme Court got it right.

Yamaha recognizes, of course, that as a general matter, a denial of certiorari imports no view by the United States Supreme Court one way or the other about the rightness of the decision below. But Yamaha argues with considerable plausibility that the special history of the *Dau Van Tran* case suggests that this is an instance in which the Supreme Court directly intervened once and then must have advertently

declined to intervene a second time because it felt that ultimately the proper result had been reached.

I do not think that this is a conclusion that we are compelled to arrive at. Just as it has been important to the Supreme Court to make clear, in cases following *Gaudet*, that *Gaudet* is a case confined to territorial waters, so it is important for us to recognize, it seems to me, that *Miles* is a case which arose as a seaman's case under the Death on the High Seas Act. Indeed, at many points in the opinion, Justice O'Connor makes plain the contours of the case. The very opening sentence is: "We decide whether the parent of a seaman who died from injuries incurred aboard respondents' vessel may recover under general maritime law for loss of society, and whether a claim for the seaman's lost future earnings survives his death." 111 S. Ct. at 319-20.

Bearing in mind the scope and the limitations of *Miles*, it seems to me that the proper view of the accumulation of cases from *Gaudet* through *Miles*, in each of which the Supreme Court has discussed *inter alia* whether a loss of society claim can be made, is that the Supreme Court has not merely not overruled *Gaudet* within the range of its application but has recognized expressly, both in *Mobil Oil* and in *Tallentire*, that recoveries for loss of society would be appropriate in cases not constrained by statute, that is to say cases unlike cases to which the DOHSA or the Jones Act, both of which are geared to pecuniary recoveries, would apply.

So that, in my judgment, the result arrived at by the Supreme Court of Texas in *Texaco v. Dau Van Tran,* though correct on jurisdiction, is too blunt in equating the case before it with *Miles*. I do not think that *Miles* in terms or by necessary implication governs our case with respect to recovery for loss of society.

Yamaha makes a separate argument with respect to the unavailability of a claim for loss of society. That separate argument is that there can be no claim for loss of society in the absence of a showing of financial dependence by the survivors of the decedent. There is very substantial support for the position contended for by Yamaha. A recent statement of the position which quite comprehensively discusses the antecedent

case law is the decision of the Florida district court to which I have already referred, *Cantore v. Blue Lagoon Water Sports.* Judge King's opinion concludes that absent a showing of financial dependence there can be no recovery within the contours of the federal maritime action for loss of society.

Among the other authorities which can be mustered in support of the result arrived at in *Cantore* is the opinion of the Fifth Circuit in *Miles v. Melrose,* 882 F.2d 976 (5th Cir. 1989), a decision which the Supreme Court reviewed and affirmed in *Miles v. Apex.* The Fifth Circuit concluded that a claim for loss of society could not be asserted within the contours of a federal maritime claim absent a showing of financial dependence.

Given the Supreme Court's affirmance, would it not appear that there is little basis for maintaining a loss of society claim in a case such as the one before this court in the absence of a showing of financial dependence? There seem to me to be two problems with the proposition. One is the point which I have already made in other contexts, that *Miles* is in one important respect not a case like ours, that is to say it is a case involving the death of a seaman. The second point is this: The cases on which Yamaha relies commonly build their conclusion on the proposition that a bright line needs to be drawn to define those cases in which a claim for loss of society can be asserted as against those cases in which such a claim cannot be asserted, and on the corollary proposition that financial dependence is a sensible bright line of separation. The syllogism seems to me to be intrinsically odd. There is no ground for suggesting that the values involved in loss of society — values which are defined by Justice Brennan in footnote 17 of *Gaudet*, values of affection and connection, so multitudinous in the family context — are values that are any more cherished or more clearly demonstrable in circumstances of financial dependence. It may well be that a bright line is called for, but it would strike me that logic would look for that bright line to be drawn in terms of closeness of relationship rather than financial linkage. And, surely, closeness of relationship of parent and child is matched only by the closeness of relationship of spouses

So, recognizing that the strong thrust of the cases is in favor of the contention made by Yamaha, I must conclude that the thrust of the cases has little to support it in the logic of remedies. Moreover, I would point out that, to the extent that *Miles* is regarded as strong authority in favor of the result arrived at in, for example, *Cantore*, in one sense *Miles* could be said at least to suggest neutrality with respect to the significance of financial dependence. As I have pointed out, the Supreme Court in *Miles* affirmed the Fifth Circuit. The Fifth Circuit's ruling with respect to the unavailability of a claim for loss of society was based on its conclusion that such claim could not be made in the absence of a showing of dependence.

The Supreme Court affirmed the ruling but on a different basis. In following a different path to the same result, the Court, although it cannot be regarded as disallowing the Fifth Circuit's logic, can hardly be said to have endorsed it. The availability of a claim for loss of society was announced by the Court in *Gaudet* and has been preserved by the Court in every subsequent case, albeit in no subsequent case has the Court had occasion to sustain a recovery for loss of society, since every one of the cases was distinguishable from *Gaudet*. But, the thrust of the cases, so it seems to me, is to preserve such a claim in a case not governed by statute but rather by a judicially architected maritime cause of action. So I will deny so much of the motion for partial summary judgment as calls for dismissal of the claim for loss of society damages.[5]

The defendant, Yamaha, takes the same position with respect to the claim for loss of support and services as it does with respect to the loss of society claim — namely that, absent a showing of dependence, such a claim is not assertable. Claims for loss of support and services are claims essentially of a pecuniary nature. It may be difficult to measure in dollar terms what a teenager might have contributed in support and

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5. The fact that Pennsylvania law has apparently not yet recognized a parental claim for loss of the society of a deceased child, see *Brower v. City of Philadelphia*, 557 A.2d 48 (Pa. Cmwlth. 1989), *Schroeder v. Ear, Nose & Throat Assoc., Inc.*, 557 A.2d 21 (Pa. Super. 1989), does not affect my conclusion that such a claim is a proper ingredient of the federal maritime cause of action. See *supra* note 4.

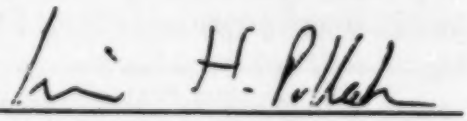
services to her family constellation during the years before she became an adult, but the problems of proof are hardly insurmountable. Suffice it to say that the reasons for retaining such a damage claim — modest as I would expect it to be — seem to me to follow, *a fortiori*, from retention of the claim for loss of society, a nonpecuniary claim.

Finally, there is the question of a claim for punitive damages. There is no authority of which I am aware that persuasively suggests that the federal maritime cause of action designed in *Moragne*, and continued in subsequent cases, would embrace a claim for punitive damages. The Court has preserved, as I read the cases, the nonpecuniary claim for loss of society. I see no reason to suppose that the Court will be disposed to extend the contours of the maritime claim in the massive sense implicated by a punitive damages claim.

Accordingly, I will grant the motion for partial summary judgment insofar as it dismisses the claim for punitive damages.

I have spoken myself out. You have been very patient, all of you, in listening to this much too lengthy exegesis. It has taken a considerable time to work these matters out in my mind, as I found them complex. At the same time, I found them important and I have not wished to rule until the issues were really settled in my mind; that explains — though it may not justify — the fact that this ruling has been so many months in gestation.

I will enter a brief written order, simply recapitulating my rulings, that is to say: granting summary judgment dismissing the punitive damages claim and granting summary judgment dismissing the claim for loss of future earnings; denying summary judgment with respect to the claims for loss of society and loss of support and services.



Pollak, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LUCIEN B. CALHOUN and ROBIN L. CALHOUN, Individually and as Administrators of the Estate of Natalie K. Calhoun, deceased	:	CIVIL ACTION
v.	:	
YAMAHA MOTOR CORPORATION, U.S.A.	:	
YAMAHA MOTOR CO. LTD.	:	No. 90-4295

ORDER

For the reasons stated in the accompanying Memorandum:

1. Defendants' motion for reconsideration of the portion of the December 29, 1992 order denying summary judgment with respect to plaintiffs' claim for damages for loss of society is DENIED.

2. Defendants' motion for certification to the Court of Appeals, pursuant to 28 U.S.C. § 1292(b), of the portion of the December 29, 1992 order denying summary judgment with respect to plaintiffs' claim for damages for loss of society is GRANTED.

In granting the motion for certification pursuant to § 1292(b), I find that the order certified for review "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation ..." 28 U.S.C. § 1292(b) (Supp. 1992). The question of law to be reviewed may be characterized as follows:

> Natalie Calhoun, the minor child of plaintiffs Lucien B. Calhoun and Robin L. Calhoun, who are Pennsylvania residents, was killed in an accident not far off shore in Puerto Rico, in the territorial waters of the United States. Plaintiffs have brought a diversity suit against, *inter alia*, defendants Yamaha Motor Corporation, U.S.A. and

Yamaha Motor Co., Ltd. The counts of the complaint directed against the Yamaha defendants allege that the accident was caused by a defect or defects in a Yamaha jet ski which Natalie Calhoun had rented and was using at the time of the fatal accident. Those counts sound in negligence, in strict liability, and in implied warranties of merchantability and fitness. The district court has concluded that admiralty jurisdiction attaches to these several counts and that they constitute a federal maritime cause of action. The question of law certified to the Court of Appeals is whether, pursuant to such a maritime cause of action, plaintiffs may seek to recover damages for the loss of the society of their deceased minor child.

June 1, 1992

Pollak, J.

ENTERED: June 3, 1993
CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LUCIEN B. CALHOUN and ROBIN L. CALHOUN, Individually and as Administrators of the Estate of Natalie K. Calhoun, deceased	:	CIVIL ACTION
v.	:	
YAMAHA MOTOR CORPORATION, U.S.A. YAMAHA MOTOR CO. LTD.	:	No. 90-4295

MEMORANDUM

POLLAK, J. JUNE 1, 1993

Defendant Yamaha[1] has moved for reconsideration of that portion of the order of December 29, 1992, which, pursuant to the bench opinion of December 24, 1992, denies Yamaha's motion for summary judgment with respect to the claim of plaintiffs Lucien B. Calhoun and Robin L. Calhoun for loss of society damages arising out of the death of their minor child. In the alternative, Yamaha asks that the questions of law involved be certified to the Court of Appeals for interlocutory review pursuant to 28 U.S.C. § 1292(b).

A.

Plaintiffs contend that the motion should be denied as untimely. Since the order in question was filed on December 29, 1992, strict compliance with Local Rule 20(g)'s ten-day requirement would have entailed the filing of a motion for reconsideration no later than January 8, 1993; Yamaha's motion was in fact not filed until February 12, 1993. Yamaha seeks to justify its delay by pointing out that it "wished to obtain and review the transcript of the hearing and opinion and research in detail the basis for the court's December 24, 1992 ruling in order to precisely formulate the issues for

1. There are, in fact, two defendants, Yamaha Motor Corporation, U.S.A. and Yamaha Motor Company, Ltd. For the sake of simplicity, I refer to them collectively as "Yamaha."

reconsideration." Doc. #75 (Reply Brief in Support of Motion for Reconsideration) pp. 1-2. Since the December 24 bench opinion was an extended analysis of somewhat complex case law, I think Yamaha's feeling that it needed an opportunity to review the transcript of that opinion — a transcript that, doubtless due to the intervening holidays, was not filed until January 13, 1992 — was understandable. Moreover, the delay in filing the motion for reconsideration until February 12 did not in any way impair plaintiffs' capacity to respond to the motion. Accordingly, although as a general matter I think Local Rule 20(g) should be carefully followed, I conclude that, given that the rule is *not* jurisdictional, I will, in this instance, overlook Yamaha's non-compliance (but, at the same time, I would point out to counsel that the better course would have been to move within the prescribed ten days for leave to file out-of-time). The motion for reconsideration will therefore be considered on its merits.

B.

Upon consideration of the motion for reconsideration on its merits, I conclude that it should be denied. The arguments put forward by Yamaha are essentially the same arguments that I addressed, and found unpersuasive, in the bench opinion of December 24, 1991. Yamaha does rely on one Third Circuit case — *DeLoach v. Companhia de Navegacao Lloyd Brasileiro,* 782 F.2d 438 (3d Cir. 1986) — not cited in its prior submissions. That case, however, was unlike the case at bar in salient respects: the plaintiff in *DeLoach* was a child seeking damages for the loss of a parent's society, not vice-versa; moreover, in *DeLoach* the person injured was a longshoreman — i.e., he belonged to a category of persons with respect to whose injuries Congress has legislated, whereas, in the case at bar, the plaintiffs' daughter, whose death occurred in territorial waters (i.e., not within the scope of DOHSA), did not belong to any category of persons dealt with by federal statute. The other case Yamaha heavily relies on but did not previously cite is *Polackwich v. Florida Power & Light Co.,* Case No. 91-4936; Circuit Court of the Thirteenth Judicial Circuit (Florida, Nov. 13, 1992), a state court case which adds little to

Texaco Refining & Marketing, Inc. v. Estate of Dau Van Tran, 808 S.W.2d 61 (Texas, 1991), discussed at some length in the bench opinion.

Yamaha's motion does identify a clear error in the bench opinion — namely, that in discussing *Sea-Land Services v. Gaudet*, 414 U.S. 573 (1974), I described the case as one in which the plaintiff was decedent's mother. In fact, the plaintiff in *Gaudet* was decedent's widow. To rectify the error, I have amended the bench opinion. However, the error is not one that affected my analysis of the bearing of *Gaudet* and subsequent Supreme Court decisions on the case at bar.

Accordingly, I adhere to the views expressed in the December 24, 1992 bench opinion and the order of December 29, 1992.

C.

Notwithstanding my continued adherence to the legal conclusions announced in the December 24, 1992 bench opinion, I think Yamaha is on sound ground in contending that those conclusions are by no means manifestly correct. Even though I rejected Yamaha's arguments, I certainly acknowledge that there is force and considerable case law to support them. Under these circumstances I am persuaded that the December 29, 1992 order which, based on the bench opinion, denied so much of Yamaha's partial summary judgment motion as sought dismissal of plaintiffs' claims for loss of society, "involves a controlling question of law as to which there is substantial ground for difference of opinion. . . . " 28 U.S.C. § 1292(b) (Supp. 1992). Moreover, I am satisfied "that an immediate appeal from the order may materially advance the ultimate termination of the litigation." *Id.*[2] Accordingly, I have decided that, pursuant to 28 U.S.C. § 1292(b), the appropriate course is certification of the order, in the aspect referred to, to the Court of Appeals, for interlocutory review. Such certification is embodied in the order filed together with this Memorandum.

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2. An authoritative determination by the Court of Appeals of the damages horizon may sufficiently narrow the discrepant hopes and expectations of the parties with respect to a likely jury verdict so as materially to enhance the possiblities of settlement.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LUCIEN B. CALHOUN and ROBIN L. CALHOUN, Individually and as Administrators of the Estate of Natalie K. Calhoun, deceased	:	CIVIL ACTION
v.	:	
YAMAHA MOTOR CORPORATION, U.S.A. YAMAHA MOTOR CO. LTD.	:	No. 90-4295

ORDER

For the reasons set forth in the accompanying Memorandum:

1. The certification pursuant to 28 U.S.C. § 1292(b) contained in the order of June 3, 1993, is hereby AMENDED to read as follows:

> Natalie Calhoun, the minor child of plaintiffs Lucien B. Calhoun and Robin L. Calhoun, who are Pennsylvania residents, was killed in an accident not far off shore in Puerto Rico, in the territorial waters of the United States. Plaintiffs have brought a diversity suit against, *inter alia*, defendants Yamaha Motor Corporation, U.S.A. and Yamaha Motor Co., Ltd. The counts of the complaint directed against the Yamaha defendants allege that the accident was caused by a defect or defects in a Yamaha jet ski which Natalie Calhoun had rented and was using at the time of the fatal accident. Those counts sound in negligence, in strict liability, and in implied warranties of merchantability and fitness. The district court has concluded that admiralty jurisdiction attaches to these several counts and that they constitute a federal maritime cause of action. The questions of law certified to the Court of Appeals are whether, pursuant to such a maritime cause of action, plaintiffs may seek to recover (1) damages for the loss of the society of their deceased minor child, (2) damages for the loss of their child's future earnings, and (3) punitive damages.

2. Proceedings in this court will be STAYED pending whatever action may be taken by the Court of Appeals with respect to the questions certified to that court in paragraph 1 of this Order pursuant to 28 U.S.C. § 1292(b).

JUNE 17, 1993

POLLAK, J.

ENTERED: June 21, 1994
CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LUCIEN B. CALHOUN and ROBIN L. CALHOUN, Individually and as Administrators of the Estate of Natalie K. Calhoun, deceased	:	CIVIL ACTION
v.	:	
YAMAHA MOTOR CORPORATION, U.S.A. YAMAHA MOTOR CO. LTD.	:	NO. 90-4295

MEMORANDUM

POLLAK, J. JUNE, 1993

I.

Plaintiffs, Lucien B. Calhoun and Robin L. Calhoun, have moved for an amendment to the order of June 3, 1993, which, at the instance of the Yamaha defendants (Yamaha Motor Corporation, U.S.A. and Yamaha Motor Co., Ltd., hereinafter "Yamaha") certified a question of law to the Court of Appeals pursuant to 28 U.S.C. § 1292(b). The question certified in the order of June 3 was whether "plaintiffs may seek to recover damages for the loss of the society of their deceased minor child," Natalie Calhoun. By their motions, plaintiffs seek to enlarge the certification to include the questions whether plaintiffs may seek to recover (1) damages for the lost future earnings of Natalie Calhoun and (2) punitive damages. Yamaha does not object to enlarging the certification in the manner proposed.

II.

In a bench opinion of December 24, 1992 — an opinion whose determinations were embodied in an interlocutory order of December 29, 1992 — I ruled that plaintiffs could seek to recover loss of society damages and also damages for loss of support and services during Natalie Calhoun's minority, but that plaintiffs could not seek to recover damages for lost future earnings or punitive damages. It is these two latter categories of damages that plaintiffs now wish to have the Court

of Appeals consider concurrently with its consideration of the question that I certified on June 3.[1]

In order to certify these two additional questions I must find, as I found with respect to the question certified on June 3, that (1) with respect to these questions "there is substantial ground for difference of opinion," and (2) an immediate appeal . . . may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). I do so find.

(1) As to whether "there is substantial ground for difference of opinion," my views are these:

In the bench opinion of December 24, 1992, I discussed at some length the viability of plaintiffs' claim for damages for lost future earnings. I concluded that, if the Supreme Court were to consider a maritime action presenting the particular features of the case at bar, it would not find a claim for lost future earnings to be cognizable. However, I did not say — and I cannot say today — that the issue is free from doubt. I do think plausible arguments can be made the other way — sufficiently plausible so that it is proper to say that "there is substantial ground for difference of opinion."

The bench opinion dismissed the punitive damages claim with almost no discussion. In moving for enlargement of the certification plaintiffs point to case authority which, they submit, would support the conclusion that a punitive damages claim is cognizable in a maritime action of the kind presented here. While my view that such a claim is not cognizable has not changed, I acknowledge that respectable contrary arguments can be made and that there is no Supreme Court or Third Circuit authority that squarely compels the conclusion I came to in the bench opinion. Accordingly, I am prepared to say that there is, within the meaning of 28 U.S.C. § 1292(b), "substantial ground for difference of opinion."

(2) There is, in my view, no question that authoritative resolution by the Court of Appeals of the two damages questions plaintiffs want certified "may materially advance the ulti-

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1. Assuming, of course, that the Court of Appeals, in the exercise of its discretion, concludes that the question certified on June 3 warrants present review and therefore, decides to "permit an appeal," 28 U.S.C. § 1292(b), from the interlocutory order of December 29, 1992.

mate termination of the litigation." Enhanced assurance as to the character of the legally cognizable damage claims should facilitate possible settlement of the case. And, if a settlement is not arrived at, the ensuing trial would be conducted with a greater degree of certitude as to the issues to be presented to the jury.

If no claim for loss of society damages had been made in this case, I might well not have thought it appropriate to recommend to the Court of Appeals that it consider the two claims — damages for lost future earnings and punitive damages — which are the subject of the pending motion. But, since there is a claim for loss of society damages, and that claim has been certified to the Court of Appeals, considerations of sensible judicial administration argue in favor of the concurrent presentation to the Court of Appeals of all three of these closely interrelated claims.

III.

Accordingly, I will, in an accompanying order, amend the June 3 certification to include the questions presented by plaintiffs. The amended certification will be as follows:

> Natalie Calhoun, the minor child of plaintiffs Lucien B. Calhoun and Robin L. Calhoun, who are Pennsylvania residents, was killed in an accident not far off shore in Puerto Rico, in the territorial waters of the United States. Plaintiffs have brought a diversity suit against, *inter alia*, defendants Yamaha Motor Corporation, U.S.A. and Yamaha Motor Co., Ltd. The counts of the complaint directed against the Yamaha defendants allege that the accident was caused by a defect or defects in a Yamaha jet ski which Natalie Calhoun had rented and was using at the time of the fatal accident. Those counts sound in negligence, in strict liability, and in implied warranties of merchantability and fitness. The district court has concluded that admiralty jurisdiction attaches to these several counts and that they constitute a federal maritime cause of action. The questions of law certified to the Court of Appeals are whether, pursuant to such a maritime cause of action, plaintiffs may seek to recover (1)

damages for the loss of the society of their deceased minor child, (2) damages for the loss of their child's future earnings, and (3) punitive damages.

Also, in the accompanying order, I will, pursuant to the joint request of the parties, direct that further proceedings in this court be stayed pending whatever action may be taken by the Court of Appeals pursuant to the amended § 1292(b) certification.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

July 7, 1993
#B-132

No. 93-8063
LUCIEN B. CALHOUN, et al, Petitioners
v.
YAMAHA MOTOR CORPORATION, U.S.A., et al.
(E.D. of Pa. Civil No. 90-04295 (LHP))

Present: STAPLETON, NYGAARD and SEITZ, *Circuit Judges.*

Petition for permission to appeal from an interlocutory order pursuant to 28 U.S.C. § 1292(b) and F.R.A.P. 5(a).

Deputy Clerk 597-1092

See **93-8054, B-131.**

ORDER

The foregoing petition is granted.

This appeal will be consolidated with the appeal at No. 93-8054.

By the Court,

Circuit Judge

Dated: July 16, 1993
Am/cc: JD
WRN
WJT
TAM

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

June 25, 1993
#B-131

No. 93-8054
YAMARA MOTOR CORPORATION, U.S.A. and
YAMAHA MOTOR COMPANY, LTD., Petitioners
vs.
LUCIEN B. CALHOUN and ROBIN L. CALHOUN,
Individually and as Administrators of the
Estate of NATALIE K. CALHOUN, Deceased,
Respondents
(E.D. of Pa. Civil No. 90-04295 (LHP))

Present: STAPLETON, NYGAARD and SEITZ, *Circuit Judges.*

Petition for permission to appeal from an interlocutory order pursuant to 28 U.S.C. § 1292(b) and F.R.A.P. 5(a),

Anthony Infante/ds

DEPUTY CLERK 597-1092

ORDER

The foregoing petition is granted.

Judge Nygaard would deny the petition.

By the Court,

Walter K. Stapleton

Circuit Judge

Dated: July 16, 1993
Am/cc: JD
WRN
WJT
TAM

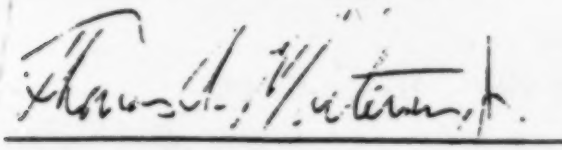
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LUCIEN B. CALHOUN and ROBIN L. CALHOUN, Individually and as Administrators of the Estate of Natalie K. Calhoun, deceased,	:	CIVIL ACTION
Plaintiffs,	:	
v.	:	
YAMAHA MOTOR CORPORATION, U.S.A., et al	:	
Defendants.	:	NO. 90-4295

STIPULATION TO DISMISS CERTAIN DEFENDANTS

The parties, through their undersigned counsel, hereby stipulate and agree that the following defendants shall be dismissed, without prejudice, each party to bear its own costs and fees:

Palmas Del Mar, A Division of Maxxam Properties, Inc.
Palmas del Mar Company, Inc.
Palmas Yacht Club, Inc.
Marina de Palmas Yacht Club, Inc.
Maxxam Properties, Inc.
Candelero Hotel Corporation
Marina de Palmas Shipyard, Inc.



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IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 93-1736 and 93-1737

LUCIEN B. CALHOUN and ROBIN L. CALHOUN,
individually and as Administrators of the
Estate of NATALIE K. CALHOUN, Deceased,
Appellees/Cross-Appellants

v.

YAMAHA MOTOR CORPORATION, U.S.A.
and YAMAHA MOTOR COMPANY, LTD.,
Appellants/Cross-Appellees

YAMAHA MOTOR CORPORATION, U.S.A.
and YAMAHA MOTOR COMPANY, LTD.,
Appellants/Cross-Appellees

v.

LUCIEN B. CALHOUN and ROBIN L. CALHOUN,
Individually and as Administrators
of the Estate of NATALIE K. CALHOUN, Deceased
Appellees/Cross-Appellants

Philadelphia, Pennsylvania
April 13, 1994

BEFORE: THE HONORABLE EDWARD R. BECKER,
Circuit Judge
THE HONORABLE ANTHONY J. SCIRICA,
Circuit Judge
THE HONORABLE CAROL LOS MANSMANN,
Circuit Judge

ORAL ARGUMENT

Barbara M. Ostermann
Official Court Reporter
2722 U.S. District Courthouse
Philadelphia, PA 19106

Proceedings reported by stenography, transcript produced by Computer Aided Transcription

[2]

APPEARANCES:

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Estate of Natalie K. Calhoun, Deceased

[3]

JUDGE BECKER: Very well. We will first call Calhoun versus Yamaha. Mr. Dryer, Mr. Masterson.

MR. DRYER: Good morning, Your Honors. I would first like to reserve five minutes for rebuttal.

JUDGE BECKER: State your name for the record.

MR. DRYER: Yes, my name is Jonathan Dryer. I represent the Yamaha defendants in the case below.

JUDGE BECKER: You may proceed. You may assume that we are familiar with the facts and the record and get right into your argument.

MR. DRYER: Thank you, Your Honor. I would like to begin by noting that the *Wahlstrom* case from the Second Circuit, which we cited in our most recent brief, has since had certiorari denied by the United States Supreme Court.

We believe that this case which is factually and legally indistinguishable from the *Calhoun* case, coupled with the Supreme Court's treatment of the Texas opinion in *Dua Van Tran* makes several elements completely clear regarding the general maritime cause of action.

The first of these is that remedy does not vary within the territorial waters according to who the claimant is or is not. A Jones Act seaman, a civilian will receive the same type of remedy for an injury within, or death within the territorial waters.

[4]

The second thing we believe these cases make clear is that the remedy afforded within those territorial waters does not include damages for loss of society, for future wages or for punitive damages.

Prior to the *Moragne* case there was no federal remedy whatsoever for wrongful death within territorial waters. The remedy depended on whether or not a particular state had a statute which would afford that remedy. *Moragne* changed this situation by overruling a case called *The Harrisburg* and created a federal common-law remedy for deaths and situations that were not covered by the federal statute.

JUDGE MANSMANN: Mr. Dryer, could I ask you a policy question?

MR. DRYER: Certainly.

JUDGE MANSMANN: I think this is, frankly, in my own mind, this is what it is perhaps going to boil down to, as to whether we ought to be treating, for want of better words, ordinary citizens as the statutes and the Supreme Court has treated seamen with respect to admiralty law.

MR. DRYER: Yes.

JUDGE MANSMANN: Or should we be treating them as ordinary citizens under state law.

[5]

MR. DRYER: I think the Supreme Court answered that question in the *Foremost* case. What *Foremost* has decided is that pleasure boating, recreational boating activities do come within the ambit of the admiralty jurisdiction. Once within the admiralty jurisdiction, the Court has evinced a clear statement throughout the course of its decisions to provide uniform remedies to all that are injured.

JUDGE MANSMANN: But what is the federal interest in that?

MR. DRYER: The federal interest is the protection of maritime trade. For example, if you turn the facts of this case around and have a boat striking the jet ski rather than vice-versa, you then have a situation where you are talking about the liability of a vessel in Congress— in commerce, I'm sorry.

You are talking about the effect on interstate commerce or admiralty jurisdiction, you are talking about the entire system. The federal interest in uniformity of remedy and in uniformity of enforcement is the protection of maritime commerce and the providing of a predictable remedy for any type of action or injury which may result from the operation of that admiralty—

JUDGE BECKER: And you would suggest that this patchwork of Supreme Court cases in the wake of *Moragne* gives you anything predictable—

[6]

MR. DRYER: I believe it does.

JUDGE BECKER:— especially when you look at the peregrinations of Judge Pollak's decision on the one hand, on

the other hand a brilliant man, he taught me federal jurisdiction, back and forth, back and forth, that is clear?

MR. DRYER: That's what— I believe they are trying to make it clear throughout the series of decisions which have ensued.

JUDGE BECKER: Have they succeeded?

MR. DRYER: I believe they have, Your Honor.

JUDGE BECKER: Really? This is a simple case.

MR. DRYER: I believe it is. If you go back to *Moragne,* back to the original decision which established the general maritime cause of action, at page 1788 of *Moragne* in the Supreme Court Reporter page 401 of the same decision in the U.S. Reporter, the Court says as follows: "Our recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime"—

JUDGE MANSMANN: They were talking about a seaman.

[7]

MR. DRYER: They were, they were talking about a longshoreman in *Moragne,* a Seriaki seaman, yes.

JUDGE MANSMANN: Exactly. So my point is aren't there very different public policies that protect ordinary consumers, for example, against a manufacturer that would be at least as strong as your public policy of the federal interests in interstate commerce where you have an ordinary consumer and you have a vessel, seaworthy, a vessel on navigable waters?

MR. DRYER: I think the Court has also spoken to that concern in its treatment of the *Dua Van Tran* case. For example, *Dua Van Tran* was a civilian. The case was originally proceeded and tried under Texas State law pursuant to the interest that Texas supposedly had in the protection of its citizens. Remedies were awarded under state law, under the state law of Texas, and the intermediate Texas Appeals Court affirmed that decision.

The Supreme Court granted certiorari of the intermediate decision, looked at the situation, and instructed the Court to reconsider its decision in light of *Sisson versus Ruby. Sisson versus Ruby* is a products liability case in which the Court extended admiralty jurisdiction to products liability.

When the case came back to the Texas Court of Appeals,

[8]

they allegedly reconsidered under *Sisson versus Ruby,* but reached exactly the same result. That case then went up to the Texas Supreme Court. The Texas Supreme Court said, no, you can't do this, you cannot apply your interest under state rules. Where federal maritime jurisdiction is applicable, as it is here, you have to afford the remedy under maritime jurisdiction. State laws, state interests must fall to the national uniform—

JUDGE MANSMANN: In *Dua Van Tran* where did the incident occur, the accident?

MR. DRYER: It occurred within territorial waters. The facts of the case involved an individual who was attempting to free a boat and a wake, I believe, from a Texaco tanker came by and swamped the boat and crushed this individual.

JUDGE MANSMANN: And what was the public policy argument there?

MR. DRYER: The public policy is the uniformity of remedy within admiralty that state concerns bow to a uniform system of maritime justice.

I think it is important to note from the onset with *Moragne* that the Court wasn't saying they are going to come in and establish a certain minimum standard of recovery that is going to exist in territorial waters.

[9]

What they were saying is that they are going to come in and establish the standard of recovery. And going back to what Judge Becker had questioned regarding whether this patchwork system that we have before us is effective and predictable, I think it is becoming that way.

Moragne didn't leave the future Court without guidance. It said you look to DOHSA, you look to the Jones Act and you look to the collective jurisprudence of the individual state. You don't look to any one individual.

JUDGE BECKER: You mean we engage in counting, the majority rules?

MR. DRYER: I don't know that it's a strict count.

JUDGE BECKER: What if it is 26 to 24?

MR. DRYER: The most recent discussion from the Supreme Court in that area would have occurred in *Miles* regarding loss of future wages. In *Miles* the Court said we have a situation where there's only three, and there may be some others, three states that allow unlimited future wages up to the point of the decedent's normal expected death.

What they said is that we are not going to adopt this particular element of damages in the absence of a compelling [10]
mandate, such as the Supreme Court had originally seen in *Moragne.*

JUDGE BECKER: Most states have punitive damages, yet you wouldn't go by the majority rule on punitive damages, Mr. Dryer.

MR. DRYER: The first source, Your Honor, the first source of recovery is not the state statute. The first source is a goal for uniformity with DOHSA and the Jones Act.

JUDGE BECKER: But DOHSA and the Jones Act have got utterly nothing to do with this case which didn't involve a seaman, which didn't involve an unseaworthiness claim, and which happened within territorial waters.

MR. DRYER: DOHSA does not involve a case which happens within territorial waters, that is correct.

JUDGE BECKER: That is right. The Act doesn't apply.

MR. DRYER: Well, that is correct, Your Honor. However, the *Moragne* Court specifically stated repeatedly that DOHSA should be the primary model, the primary model for the fashioning of the general maritime remedy. DOHSA itself does not permit punitive—

JUDGE BECKER: With Judge Mansmann's permission, *Moragne* is also a limited case. Why should we apply *Moragne* beyond its factual scenario?

[11]

MR. DRYER: Because the intent of *Moragne* was to create a uniform remedy within the three-mile period for maritime death.

JUDGE SCIRICA: But for civilians?

MR. DRYER: For everyone.

JUDGE BECKER: Where does it say that? That is not—

JUDGE SCIRICA: Where does it implicate civilians?

MR. DRYER: It says, the specific holding of *Moragne* is that they desire to create a uniform remedy, a uniform remedy within territorial waters. Does it say for everyone? No, but the subsequent interpretations of the case have recognized that it applies across its boundaries.

Miles, for example, did not limit that aspect of *Moragne* to its facts. It did limit other aspects of other cases to their facts. But as the decisions have evolved, there is a clear pattern from the Supreme Court and from other Circuit Courts, such as *Wahlstrom,* which have suggested that there is a uniform intent for remedy within those three miles regardless of who was injured.

JUDGE SCIRICA: *Miles* involved a seaman.

MR. DRYER: Yes, it did.

JUDGE SCIRICA: All right. What is there, anything in

[12]

any Supreme Court decision that carries this over to a civilian?

MR. DRYER: Expressly, *Miles* involves a seaman. *Miles* does not expressly state that it should go beyond that, however it is interesting to note the holding of *Miles* with regard to loss of society, and the *Gaudet* case which was being discussed beforehand, the Court held in *Miles* that a seaman's recovery under the General Maritime Act or the general maritime remedy cannot include loss of society.

The Court also held that a general maritime cause of action does not include loss of future wages. Now, they put the limitation on the initial element of damages, the loss of society, because that was to distinguish from *Gaudet.* They did not put the same limitation on the loss of wages remedy.

That coupled with the treatment of *Dua Van Tran* which was a civilian, clearly a civilian, and when the case went up the first time, the Texas Court was given specific instructions as to how to deal with it. After they dealt with it in the fashion consistent with maritime law, it was taken back up and the Court declined to hear it again.

JUDGE MANSMANN: May I ask a question? I can appreciate that if this lawsuit were as between the family of [13]
the young girl and the ship in interstate commerce, then we have the public policy that you have explained to us.

But let's suppose there were no ship involved at all, and this is the jet ski, only the jet ski that goes down or whatever.

MR. DRYER: It explodes.

JUDGE MANSMANN: It explodes. How is interstate commerce affected so that the same public policy grounds would apply there?

MR. DRYER: The same public policy grounds might occur in the same fashion that might arise, if for example, an airplane comes down and crashes on an airport, the airport would be closed down. If you had a maritime death—

JUDGE MANSMANN: But if the airplane comes down over navigable waters, the Supreme Court has said, no, we don't need to look at those kinds of things.

MR. DRYER: I'm sorry, I misled you with that analogy.

JUDGE MANSMANN: But my point is we have situations where accidents or something occur over navigable waters or within territorial waters and the Supreme Court has said, no, this is not a case such that the maritime laws ought to apply, admiralty jurisdiction doesn't apply.

[14]

MR. DRYER: I again apologize because I did mislead you with that. My point with the analogy of the accident is that if you have a situation where the jet ski, for whatever reason, is involved in an accident, you may very well have a closure of the harbor while the investigation is concerned. You may very well have a detention of, you may very well have a detention of another ship, witnesses, this, that or whatever.

You may also have a situation, and *Foremost* recognizes that pleasure boating is not to be treated differently than commercial boating, however, you may have a situation where these types of items are being used within the realm of commercial boating as well.

JUDGE MANSMANN: But why should the interest in interstate commerce take precedence over the situation where we have a product, essentially a product liability case against the manufacturer because the product didn't do what it was supposed to do, allegedly?

MR. DRYER: Allegedly, yes.

JUDGE MANSMANN: Why in those circumstances should the public policy— I don't know how the public policy for interstate commerce assists at all or should take precedence over the states' interests and their own citizens getting what under state law is deemed to be the just result.

[15]

MR. DRYER: It is not interstate commerce that is affected; it is admiralty.

JUDGE MANSMANN: I'm sorry, admiralty, yes.

MR. DRYER: I said the same thing before. The Court has ruled consistently that a uniform system of federal admiralty law is necessary.

JUDGE MANSMANN: You were talking about seamen, I'm sorry.

MR. DRYER: Go ahead, I'm sorry.

JUDGE MANSMANN: But in all those cases they were talking about seamen.

MR. DRYER: Well, not in all of them. In all other ways.

JUDGE MANSMANN: There was the Death on the High Seas Act. That is a different story. Congress has clearly spoken there. That is because when you are on the high seas you are not in the territorial waters of a particular state. So Congress has deemed uniformity critical there.

MR. DRYER: I believe the Court has also deemed uniformity critical within the territorial waters for the reasons set forth initially in *Moragne* and continuing right through the decisions that we have cited in our brief.

[16]

JUDGE BECKER: But the flip side of Judge Mansmann's question which she didn't press you on, is the question of the state interest. Is there not a state interest in this kind of case?

MR. DRYER: I think there may very well be a state interest. I would disagree that it is Puerto Rico— that it is Pennsylvania in this case, and we could address that issue.

JUDGE BECKER: We are not, that is really not before us at this juncture.

MR. DRYER: That is correct. I think certainly there is a state interest.

JUDGE BECKER: But what you are doing, Mr. Dryer, is you are subtly transmogriphying uniformity into preemption.

MR. DRYER: Well, I think that is correct.

JUDGE BECKER: But the question is whether that is justified by the cases. *Tallentire* clearly intimated as I understand it, that federal law did not preempt the whole field of maritime tort remedies.

MR. DRYER: I think—I'm sorry.

JUDGE BECKER: Well, indeed it continued, it didn't approve or didn't disapprove, but it didn't disapprove the practice of applying state survival statutes to cases involving death on the high seas, and *Miles* suggests the survival, state

[17]

survival statutes operate. How do you respond to that?

MR. DRYER: I don't think *Miles* suggests that in individual states the survival statute applies at all. I think what *Miles* suggests is that the federal—is that there may very well be a federal survival component to the general maritime action which includes to the extent not repugnant with some of the other statutes, the certain elements of survival damages such as pain and suffering.

I think the Court recognizes that there may very well be a limited survival component, but it is not picked and chosen from any particular state law.

JUDGE BECKER: In *Dugas* we held that a Pennsylvania statute may apply directly in a DOHSA claim, did we not?

MR. DRYER: Yes, we did. And I believe that in *Dugas, Dugas,* number one, *Tallentire* would cast some severe doubt on that, because *Tallentire* is essentially the same case. It is a DOHSA case in which a state remedy is coupled.

JUDGE BECKER: So you are suggesting that this is like the *Clearfield Trust* line of cases where state law is a component of federal law.

MR. DRYER: I apologize, I am not familiar with *Clearfield Trust* but—

[18]

JUDGE BECKER: But that line of cases, *Kimble Trust, Clearfield Trust,* and Kimble allows, as I understand it, individual state laws to be incorporated into state law so as to give play to state interests.

MR. DRYER: No, I would suggest that that is not the case at all. I would suggest that as I believe in *Tallentire* the Court suggests that there is a reverse theory doctrine involved, in that although state courts may hear admiralty cases, they cannot apply state remedies. They must apply admiralty remedies.

JUDGE BECKER: Excuse me, that is what the— you said the Second Circuit?

MR. DRYER: No, I believe that is the Supreme Court in *Tallentire.*

JUDGE BECKER: I have yet to find a Supreme Court case which says that permitting state statutes to apply concurrent with *Moragne* and thereby letting the state interest have play is violative of any principle announced in any Supreme Court case, and I would like you to tell me— the red light is on— but I would like you to cite to me where, in what Supreme Court case that possibility is ruled out.

MR. DRYER: There is no express overruling of that possibility in a Supreme Court case.

JUDGE BECKER: So it is open.

[19]

MR. DRYER: I don't believe it is open under the spirit and intent of—

JUDGE BECKER: But if we disagree with the Second Circuit and create a split, then you get a chance to argue before the United States Supreme Court, Mr. Dryer.

MR. DRYER: That is a real possibility, Your Honor.

JUDGE BECKER: Okay. We will hear from Mr. Masterson.

MR. MASTERSON: May it please the Court, my name is Thomas A. Masterson, Junior. I represent the plaintiffs in this case, Lucien B. Calhoun and Robin L. Calhoun. They are the parents of Natalie K. Calhoun.

I would like to reserve three minutes for rebuttal, Your Honor.

JUDGE BECKER: Well, do you have a cross appeal?

MR. MASTERSON: Yes, sir.

JUDGE BECKER: You have a cross appeal, okay.

MR. MASTERSON: Judge Becker—

JUDGE BECKER: Of course, you do have a cross appeal, obviously.

MR. MASTERSON: You asked the question what is clear

[20]

in this area and I suggest to you there is not a lot that is clear. But I would like to spend a couple of seconds just outlining for you what I believe is clear in this area, which I think provides an analytical framework here that allows this Court to come to the conclusion that the plaintiffs have asserted is the correct conclusion in this case.

Number one, it is absolutely clear that Natalie Calhoun was not a seaman, therefore, the Jones Act and the damages limitations do not apply to this case.

Number two, Natalie Calhoun was killed in an accident within the territorial waters of the Commonwealth of Puerto Rico, therefore Death on the High Seas Act and the limitations on damages set forth in that statute do not apply.

Number three, the Death on the High Seas Act, and numerous Supreme Court opinions recognize the importance of allowing state statutes to apply in the admiralty context which is exactly the argument that we are advocating here.

Number four, the Supreme Court of the United States has consistently looked at states' interests and effected a balance

between admiralty and this concept of "uniformity in admiralty" and the power of the states to regulate conduct within their jurisdiction.

[21]

And when I was preparing for this argument yesterday, I came across a recent United States Supreme Court case which I would like to bring to your attention today which was decided on February 23, 1994, after we had filed our last brief. The name of the case is *American Dredging Company versus Miller,* and it appears at 127 Lawyers Edition 2nd, 285; 114 Supreme Court 981.

I suggest to you that this case directly supports the arguments that we have been advancing in this case regarding this context of uniformity in admiralty which I suggest to you has not been fully understood by the lower courts and which has been seized upon as an incantation to justify a result that really doesn't have any justification—

JUDGE MANSMANN: Tell us the facts of this *American Dredging.*

MR. MASTERSON: This case which was decided in February 1994, involved a maritime accident which occurred on the Delaware River here, just coincidentally. The plaintiff was a resident of Mississippi who was initially treated in this area, then went back to Mississippi and convalesced.

JUDGE MANSMANN: A seaman?

MR. MASTERSON: A seaman, that is correct. For some

[22]

reason which is not clear in the case, he elected to file a Jones Act action in the Louisiana State Court.

The defendant in the case, which was a Pennsylvania corporation, moved to have the case dismissed invoking the maritime and long-accepted doctrine of forum non conveniens.

Apparently there was a Louisiana State statute that specifically said that in maritime cases filed in Louisiana State Court, we are not going to allow the federal doctrine of forum non conveniens to take away cases from our Court, so we are not going to pay any attention to that.

The United States Supreme Court in a decision by Justice Scalia, permitted the application of that Louisiana State stat-

ute and said that it has, it did not interfere with important principles in admiralty, and he specifically addressed this issue of uniformity in admiralty which is the issue that the defendant in this case and in the *Wahlstrom* case and other cases say dictates the result that plaintiffs are entitled to no damages, and that no specific state wrongful death statute or survival statute may be invoked.

On page 296 of 127 Lawyers Edition 2nd Justice Scalia talks about this doctrine of uniformity in admiralty and Judge Becker— excuse me— talks about this preemption argument.

[23]

He says: "The requirement of uniformity is not, however, absolute. As *Jensen* itself recognized, it would be difficult if not impossible to define with exactness just how far the general maritime law may be changed, modified or affected by state legislation. That this may be done to some extent cannot be denied."

And then he goes on to quote from a case called *Romero* which we have quoted in our briefs. A later case describes to what breadth this some extent extends. Quoting from *Romero:* "It is true that state law must yield to the needs of the uniform federal maritime law when this Court finds inroads on a harmonious system, but this limitation still leaves the states a wide scope. State-created liens are enforced in admiralty. State remedies for wrongful death and state statutes providing for the survival of actions have been upheld when applied to maritime causes of action."

That is exactly what the plaintiffs are advocating in this case.

JUDGE BECKER: What was that last sentence again, Mr. Masterson?

MR. MASTERSON: Starting from the beginning?

JUDGE BECKER: No, the last sentence.

MR. MASTERSON: State remedies for wrongful death

[24]

and state statutes providing for the survival of actions have been upheld when applied to maritime causes of action.

JUDGE BECKER: Does he have a cite to that?

MR. MASTERSON: Yes, he is citing to a case called *Romero versus International Terminal Operating Company,* 358 U.S. 354, 373 to 374, 1959.

JUDGE MANSMANN: Can we talk about the public policy argument that we have, that I was discussing with Mr. Dryer. Why should individual state interests take precedence over a federal interest in seeing that the waterways are always open, are moving appropriately and quickly, and commerce is adequately and uniformally handled?

MR. MASTERSON: Your Honor, primarily because Congress, which is the body of Government which is empowered with the law-making power, has specifically decided to allow the states to continue to regulate conduct within their territory. Congress had had many occasions to enact laws that would control all of the conduct within the waterways within the states and has elected not to do that.

The Death on the High Seas Act, a number of times has come up in Congress for amendment to extend it into state territorial waters, and every time it has been turned down. [25]
There has been a consistent theme in Congress to protect the operation of state statutes within state territorial waters.

I think the Supreme Court has consistently acknowledged that interest. And that is what is happening here.

JUDGE SCIRICA: It is pretty hard to define a policy simply by reason of the fact that Congress hasn't passed a law unless you have, unless you can point to Senate hearings or Senate reports or Congressional reports.

MR. MASTERSON: Well, clearly the reports, Congressional hearings and reports that were prepared in connection with the Death on the High Seas Act reflect the great sensitivity of Congress to the powers of the states to control conduct within their territories.

JUDGE SCIRICA: Did they specifically say that state wrongful death and survival actions should be maintained for civilians within territorial waters?

MR. MASTERSON: They specifically say that they do not want the federal government to take away the rights of the

states to provide wrongful death recoveries for conduct occurring within the states, yes, that is correct.

One more point if I may on this opinion, Supreme Court [26]
opinion, because I think it is very timely. Justice Stevens wrote a concurring opinion which again focuses on this concept of uniformity in admiralty, and he makes the exact point that I am making here.

This is on page 302 of 127 Lawyers Edition 2nd. "When relevant federal legislation indicates that Congress has opted to permit state diversity in admiralty matters, a finding of federal preemption is inappropriate. Just as in cases involving non-maritime subjects, c,e.g., Cipollone, we should not lightly conclude that the federal law of the sea trumps a duly enacted state statute."

In our briefs we point out the long history in admiralty in the Supreme Court of referring to and incorporating into the law of the sea relevant state statutes. I suggest to you that in the *Dugas* case in the Third Circuit and in the *Scott versus Eastern* case, this Circuit has done exactly what ought to be done in admiralty cases throughout the country.

The tools for the results that the plaintiffs are advocating have already been decided in this Circuit. I suggest to you that the approach taken by the Third Circuit in the *Scott versus Eastern* case is absolutely intellectually the best approach to take in a case like this.

[27]

There the Court examines the relevant state interests of the parties actually involved in the lawsuit. As you may recall, that was an accident involving a plane crash in Boston Harbor. The plaintiff and decedent was a Pennsylvania resident. The accident happened in Boston.

At that time the general rule in maritime cases was that the law of the site of the accident applied.

Massachusetts wrongful death statute limited damages to ten thousand dollars. The plaintiffs in that case advocated and the Third Circuit accepted a conflict of laws approach which at that time, which was 1967, was just evolving in the cases, and that was based upon the *Griffith* case, which allowed the Court

instead of following the law of lex loci delicti, to look at the interests of the people and the interests involved in the particular incident.

In that case, they concluded that the law of Pennsylvania should be applied.

JUDGE SCIRICA: Let me ask you something that Mr. Dryer said. He mentioned to us, he said consider the situation where a vessel, let us say a commercial vessel struck the jet ski in this case, and the young girl was killed. Same analysis?

[28]

MR. MASTERSON: Yes, I think so, Your Honor, I don't see any basis for distinguishing it. And I think that the Third Circuit's decision in *Scott* was a very forward-thinking decision at the time, and is one which makes eminent good sense today.

JUDGE MANSMANN: May I ask, do the Supreme Court cases equate maritime with admiralty or does the word maritime simply mean it takes place on water?

MR. MASTERSON: That is my understanding. The actual, literal definition of admiralty versus maritime, I think there is a subtle distinction, which I can't explain to you, but the Court does basically seem to use them as the same terms.

JUDGE MANSMANN: I am wondering given Judge Scirica's question to you, if this were reversed a little bit, and the ship actually hits the jet ski, if the cause of action is based purely and simply on cross liability, why couldn't, one, for example, state law apply, but if it is based on something that is intrinsically admiralty or maritime—

MR. MASTERSON: Right.

JUDGE MANSMANN:—why within the same lawsuit couldn't those, that law or remedies apply?

MR. MASTERSON: They could, and I think that the term depecage—

[29]

JUDGE SCIRICA: That is a different answer than you gave me.

MR. MASTERSON: That is a better answer.

JUDGE SCIRICA: Well, which answer, you are saying that is a better answer.

MR. MASTERSON: Well, I like—

JUDGE MANSMANN: Could we look at the public policy.

MR. MASTERSON:— Judge Mansmann's analysis.

JUDGE MANSMANN: What are the public policies there, though, that are at stake?

MR. MASTERSON: Well, I don't see any public policy problem with doing what this Court did in *Scott* or doing what this Court did in *Dugas* or doing what the plaintiffs are advocating in this case. There is no public policy problem with acknowledging the concept of federalism and allowing state interests to be acknowledged in the admiralty setting.

It has been done in Supreme Court cases in admiralty for over a hundred and fifty years. The repeated theme in the cases is that acknowledging a state interest in admiralty does not have any negative effect on the interest of the federal government, on federal maritime system or on this "doctrine of uniformity." The *Moragne* case, which is as I said in the brief the seminal case in this area and a very important case [30]
for you to look at, was simply the culmination of a number of cases in the Supreme Court.

When you put it in context, it is very clear that the *Moragne* case was decided for one reason and one reason only, and that was to provide a uniform right of action for seamen to take advantage of the warranty of seaworthiness. It had absolutely nothing to do with damages.

And that is clear in *Moragne* and in the later cases. There has never been in a Supreme Court case a finding that "uniformity of damages" is an important federal or maritime interest when it relates to accidents occurring within state territorial waters.

The Supreme Court has always been cognizant of the rights of the states to control actions within their state territories out of comity.

JUDGE SCIRICA: I am trying to understand your position here. Commercial vessel and a jet ski hit within territorial waters. Commercial vessel claims that the jet ski was at fault and sues them for property damage. What law applies there?

MR. MASTERSON: I am hesitating because in a property damage context, I am not sure.

JUDGE SCIRICA: Okay, let's say somebody gets injured on the vessel— it's absurd, I realize that.

[31]

MR. MASTERSON: Yes.

JUDGE SCIRICA: But if it's a personal injury, then where are we?

MR. MASTERSON: Well, if it's a seaman, it is the Jones Act. If it is not a seaman, it could be the law of the territory where the accident occurs.

JUDGE BECKER: Doesn't *Kermarec* give a passenger a general maritime remedy?

MR. MASTERSON: A negligence remedy.

JUDGE BECKER: Negligence remedy.

MR. MASTERSON: Yes.

JUDGE SCIRICA: You raised some interesting questions here. I am just trying to figure out how it all sorts out when we get different factual situations.

MR. MASTERSON: I understand the permutations are endless, but one thing that is consistent here has been the Supreme Court and Congress's acknowledgment of the rights of the states to control conduct within state territory and the deference to the invocation of state wrongful death and survival statutes. That has been consistent throughout. Even in *Moragne* at the end of the opinion where the Court says, well, today we are establishing this new right of action which will allow seamen to take advantage of the wrongful death— of the unseaworthiness warranty. We are not going to be too

[32]

concerned about damages, because there are years of experience that you can draw upon, and they point to the Death on the High Seas Act, the Jones Act and the multitude of state statutes which have been incorporated into admiralty for decades.

When you look at that case in the context of the previous cases, it is very clear that what they were referring to was the centuries-long tradition of incorporating into admiralty the

specific state statutes that were relevant to the incident in question, just as the Third Circuit did in the *Scott* case.

JUDGE BECKER: Thank you, Mr. Masterson, we will take you back on rebuttal. You reserved some rebuttal time, Mr. Dryer.

MR. DRYER: Yes. I have to confess I haven't read the *American Dredging* case, but it sounded very much like a savings to suitors case.

JUDGE BECKER: We will give each of you a week to give us a memo on the *American Dredging* case and the import of it.

MR. DRYER: Thank you.

JUDGE MANSMANN: In letter form.

MR. DRYER: As for as *Scott versus Eastern Airlines* is concerned, at the time *Scott* was decided there was no federal

[33]

law to preempt the determination of state law. You had a straight conflict of law case between the laws of Massachusetts and Pennsylvania. I submit to you you don't have that any more after *Moragne.*

The other question that was asked was why not a product liability action under state law. I think *Sisson versus Ruby* addresses that, that contention squarely. *Sisson* involved a case in which a clothes dryer, I believe it was, malfunctioned on a pleasure boat which was docked in a marina and burned the entire marina down.

The attempt was made to pursue a products liability action under state law. The Court held that that was in fact a federal maritime admiralty action.

JUDGE MANSMANN: Which Court was this?

MR. DRYER: This was the Supreme Court in *Sisson versus Ruby.* I believe it is cited in our brief. As far as why *Moragne* would not have advanced beyond specific or made a statement that it applies beyond longshoremen, they made the statement that we will leave it to others to determine who the beneficiaries will be and what the damages shall be.

Twelve years later or whenever when *Foremost* was decided, pleasure boaters were brought into the ambit of the maritime jurisdiction.

[34]

I believe that is all I have, and I thank you for your time.

JUDGE BECKER: Mr. Masterson, you reserved some some rebuttal time.

MR. MASTERSON: I did. Due to the brevity of Mr. Dryer's rebuttal, the only thing I would comment on is the *Sisson* case was a jurisdictional case. It had nothing to do with what damages should apply. It was simply limited to whether that incident should be within admiralty jurisdiction. And that is the point that I again would like to focus on.

Just because something is determined to be within maritime doesn't mean that all the state interests suddenly disappear. And that is the theme that has been carried throughout the Supreme Court cases and it is a theme that I think this Court should carry through as it did in *Dugas* and *Scott versus Eastern*, and take a look at the interest of the parties involved in the issues in dispute here, which are the damages, and determine how that should be resolved.

We suggest that a standard diversity conflict of laws analysis should be done, and that when that is done, the law of Pennsylvania is the most appropriate law to absorb into this maritime cause of action.

JUDGE MANSMANN: How would we write this given

[35]

Sisson? We would say this is an admiralty case?

MR. MASTERSON: Yes, that has already been determined and that is not before you at the moment. We argued that in front of Judge Pollak. We argued that a jet ski should not be considered a vessel for the purposes of maritime jurisdiction, and he ruled against us on that, and that issue is not before you today.

But just because it is in maritime, as I say, does not mean that state interests disappear. Again, Congress and the Supreme Court have consistently acknowledged the primacy

of the states with regard to conduct occurring within their boundaries and actions affecting citizens of the states within territorial waters.

THE COURT: Thank you, Mr. Masterson.

MR. MASTERSON: Thank you.

(End of oral argument)

No. 94-1387

Court, U.S.
FILED
APR 17 1995
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

YAMAHA MOTOR CORPORATION, U.S.A.
-and-
YAMAHA MOTOR COMPANY, LTD.,

Petitioners,

vs.

LUCIEN B. CALHOUN and ROBIN L. CALHOUN, Individually and as Administrators of the Estate of Natalie K. Calhoun, Deceased,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Court of Appeals correctly decide that federal maritime law permits application of state wrongful death and survival statutes where the decedent is neither a seaman nor a longshoreman, the decedent's fatal injuries occurred in territorial waters, and the focus of the wrongdoing is land-based, not maritime?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Citations	ii
Statement of the Case	2
Reasons for Denying the Writ	4
Certiorari should be granted on the first question presented in this Petition.	4
Conclusion	8

TABLE OF CITATIONS

Cases Cited:

Anderson v. Whittaker Corp., 894 F.2d 804 (6th Cir. 1980)	5
Foremost Insurance Co. v. Richardson, 457 U.S. 668 (1982)	7
Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970)	2, 7
Sisson v. Ruby, 497 U.S. 358 (1990)	7
Spiller v. Thomas M. Lowe, Jr. & Assocs., Inc., 466 F.2d 903 (8th Cir. 1972)	5

Contents

	Page
Sutton v. Earles, 26 F.3d 903 (9th Cir. 1994)	5
Texaco Refining and Marketing, Inc. v. Estate of Dau Van Tran, 497 U.S. 1020 (1990)	7
Wahlstrom v. Kawasaki Heavy Industries, Ltd., 4 F.3d 1084 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1016 (1994) ...	4
Walker v. Braus, 995 F.2d 27 (5th Cir. 1993)	5
Statutes Cited:	
28 U.S.C. § 1292(b)	3
46 U.S.C. § 688	5
46 U.S.C. §§ 761-768	5, 6

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Respondents.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Lucien B. Calhoun and Robin L. Calhoun, individually and as Administrators of the Estate of Natalie K. Calhoun, Deceased ("Respondents"), submit this brief in

response to the Petition for a Writ of Certiorari. Although Respondents strongly disagree with Petitioners on the merits of the issues presented, Respondents support the Petition insofar as it requests this Court to grant certiorari on the first question presented.

STATEMENT OF THE CASE

This action arose from the July 6, 1989 death of Natalie Calhoun, the twelve year old daughter of Lucien B. Calhoun and Robin L. Calhoun. Natalie died from injuries sustained in a collision with a vessel anchored in the territorial waters of Puerto Rico. At the time of the accident Natalie was operating a Yamaha Wavejammer, a personal watercraft commonly referred to a jet ski, designed and manufactured by defendants Yamaha Motors Corporation, U.S.A. and Yamaha Motor Company, Ltd. ("Petitioners") for recreational use. Respondents instituted suit against Petitioners asserting claims of negligence, design defect and breach of warranty for the conduct of Yamaha which occurred on land, not in the territorial waters of the United States.

On November 27, 1991, Petitioners moved for partial summary judgment in the United States District Court for the Eastern District of Pennsylvania, arguing that federal maritime law governs this action and that loss of society, loss of future wages, and punitive damages are not recoverable under the federal maritime wrongful death cause of action created in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). Alternatively, Petitioners argued that, should it be determined that damages for loss of society are permitted under federal maritime law, Respondents must first demonstrate financial dependency on their minor child before loss of society damages can be awarded.

Respondents' opposition to Petitioners' motion contained

three arguments: (1) Maritime law does not apply since the wrong complained of does not bear a significant relationship to traditional maritime activity; (2) In the absence of a conflict with federal maritime law, maritime law does not preempt state wrongful death and survival statutes where the decedent is neither a seaman nor a longshoreman and the decedent's death occurs in territorial waters; and, (3) If federal maritime law does preempt state wrongful death and survival statutes, federal maritime law permits survivors such as Respondents to recover damages for loss of future earnings, punitive damages and damages for loss of society, irrespective of whether the survivor was financially dependent on the decedent.

The district court granted in part and denied in part Petitioners' motion for summary judgment. Specifically, the court held that maritime law applied and that federal maritime law preempted application of state wrongful death and survival statutes. Delineating the allowable damages, the district court held that, under federal maritime law, Respondents could only recover damages for loss of support and services and damages for loss of society. Neither punitive damages nor damages for loss of future earnings were held to be recoverable.

Petitioners' request for reconsideration of the district court's ruling was denied. However, at the behest of Petitioners and pursuant to 28 U.S.C. § 1292(b), the district court agreed to certify for appeal to the Third Circuit the question of whether damages for loss of society could be awarded under federal maritime law. Pet. App. 73a. Acting on Respondents' request, the court amended its certification order to include the questions on which Petitioners had prevailed, whether loss of future earnings and punitive damages are recoverable. Pet. App. 78a.

Despite Petitioners' suggestions to the contrary, the Third Circuit held that this action falls under the court's admiralty

jurisdiction. Pet. for Writ at 5, 6; Pet. App. 7a, 8a. Although the certified questions, as phrased by the district court, ask what damages are available under *federal* maritime law, the Third Circuit correctly held that those questions need not be addressed unless a determination was made that federal maritime law preempts state wrongful death and survival statutes. Pet. App. 6a. Accordingly, the Third Circuit assumed appellate jurisdiction to decide not just the certified questions but whether the premise of the district court, that federal not state law applies, was correct. Pet. App. 6a. Then, in a thorough and well-reasoned opinion, written by Judge Becker, the court held that federal maritime law's traditional choice of law principles required application of state wrongful death and survival statutes since there was no conflict between state law and federal maritime law. Therefore, it did not reach the certified questions, which dealt with only federal law.

REASONS FOR DENYING THE WRIT

CERTIORARI SHOULD BE GRANTED ON THE FIRST QUESTION PRESENTED IN THIS PETITION.

Although Respondents strongly disagree with Petitioners on the merits of the first question presented, they agree that the Third Circuit's opinion is in conflict with the Second Circuit's decision in *Wahlstrom v. Kawasaki Heavy Industries, Ltd.*, 4 F.3d 1084 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1016 (1994). In *Wahlstrom*, plaintiffs instituted suit against defendants seeking damages for the fatal injuries sustained by their seventeen year old son in a jet ski accident. Pursuant to Connecticut's Product Liability Act and its wrongful death provision, plaintiffs' prayer for relief requested punitive damages and damages for loss of society. The Second Circuit held that federal maritime law preempted the application of the wrongful death provision of Connecticut's statute and that federal maritime law limited plaintiffs' award to

only those damages allowable by the Jones Act[1] and the Death on the High Seas Act ("DOHSA")[2].

Respondents, however, disagree with Petitioners that the Third Circuit's opinion is in direct conflict with the decisions of the Fifth, Sixth, Eighth and Ninth Circuits. Careful examination of the cases cited by Petitioners at pages 11 and 12 of their Petition for Writ for Certiorari demonstrates that the Second Circuit remains the only circuit in direct conflict with the Third Circuit's holding below. In *Walker v. Braus*, 995 F.2d 77 (5th Cir. 1993), the Fifth Circuit, while questioning the viability of damages for loss of society, refused to expressly hold that those damages were not available under maritime law. *Anderson v. Whittaker Corp.*, 894 F.2d 804 (6th Cir. 1980), is factually distinguishable in that there the plaintiffs were the parents of adult, emancipated children. In *Spiller v. Thomas M. Lowe Jr. & Assocs., Inc.*, 466 F.2d 903 (8th Cir. 1972), the issue before the Eighth Circuit was not whether federal maritime law preempted state wrongful death and survival statutes for deaths occurring in territorial waters, but whether parents are included in the class of beneficiaries who may recover damages under a federal maritime wrongful death cause of action. Nevertheless, the Eighth Circuit looked to Arkansas' survival statute for guidance and further stated that plaintiffs' survival action existed under the Arkansas statute. Finally, in a well-reasoned opinion, the Ninth Circuit held in *Sutton v. Earles*, 26 F.3d 903 (9th Cir. 1994), that maritime law permitted nondependent parents to recover loss of society and loss of future earnings as damages for the death of a nonseaman or nonlongshoreman killed in territorial waters.

Even with only one direct conflict, Respondents agree that

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1. 46 U.S.C. § 688.

2. 46 U.S.C. §§ 761-768.

this is an appropriate case in which to consider the question of whether federal or state law applies. The Respondents in this case are typical of the plaintiffs who will seek to recover damages under state wrongful death and survival statutes. The Respondents here are nondependent parents of a deceased minor who was neither a seaman nor a longshoreman and whose death occurred in territorial waters. Respondents, in their individual capacity, seek damages for loss of their daughter's society and, as representatives of their daughter's estate, seek loss of future earnings and punitive damages.

The question presented here is also very important. Despite Congress' express intent that the DOHSA does not preempt state wrongful death and survival statutes where death occurs in territorial waters[3], some lower courts continue to hold that federal maritime law, as developed by federal courts, preempts those state statutes. As a result, those courts limit individuals such as Respondents to only those damages permitted under the DOHSA and/or the Jones Act.

Some lower courts, as well as Petitioners herein, have misconstrued this Court's goal for a uniform bases of *liability* in maritime actions to mean that *damages* for all persons injured in territorial waters must be limited to those damages allowed under the Jones Act and the DOHSA. Yet neither the Jones Act nor the DOHSA govern actions brought by the survivors of persons who are neither seamen nor longshoremen and who were killed in territorial waters. If this Court's goal of "uniformity in admiralty" were to be interpreted as Petitioners suggest, the result will be to create a presumption in favor of borrowing from federal law, since the only way to have the same measures of damages in every instance is to use a damages provision adopted from a federal statute. Yet, this approach effectively reverses the

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3. 46 U.S.C. § 765.

long-standing presumption in favor of applying state law where state law does not conflict with federal maritime law.

While acknowledging at page 14 of their Petition that this Court has never ruled on the issues presented for review, Petitioners, citing *Moragne*, 398 U.S. 375; *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982); *Sisson v. Ruby*, 497 U.S. 358 (1990); and, *Texaco Refining and Marketing Inc. v. Estate of Dau Van Tran*, 497 U.S. 1020 (1990), nevertheless argue that the Third Circuit's ruling is inconsistent with the express holdings and intent of this Court. Yet, this Court's holdings in *Foremost* and *Sisson* have no bearing on the issue of what damages are recoverable in a maritime cause of action. Rather, the issues decided there were whether the facts of those cases invoked the courts' admiralty jurisdiction.

Regarding *Moragne*, while this Court created a federal maritime wrongful death cause of action for unseaworthiness, the Court did not create a federal maritime survival cause of action. Nor did this Court create a federal maritime wrongful death cause of action for negligence. Respondents' claims against Petitioners are not based on the principles of negligence, products liability and breach of warranty arising from Petitioners' land-based, not maritime, conduct. Nor are Respondents' claims based on the doctrine of seaworthiness.

Finally, in *Texaco Refining & Marketing, Inc.*, 497 U.S. 1020, this Court remanded the case to the Texas state court, instructing that court to reconsider its decision in light of the *Sisson* decision. There was no holding by this Court that federal law preempted the damages provisions of state wrongful death and survival statutes. Thus, Petitioners' statement that the Third Circuit's opinion is against the express holdings and implied intent of this Court is simply not accurate.

Although Respondents agree that the first question is appropriate for review, we oppose review on the second question raised by Petitioners — the scope of damages assuming federal maritime law applies — for several reasons. First, the Third Circuit never addressed the issue. Second, by definition, there can be no conflict between the Third Circuit and any other court of appeals, or for that matter state court, on the issue. Third, as the lengthy opinion of Judge Becker makes clear, the first question is sufficiently complex on its own, without assuming the burden of the second question, which is actually several questions rolled into one, since it asks, in essence, which elements of damages are available under federal maritime law for a wrongful death claim arising in territorial waters. Should the Court reject our analysis and that of the Third Circuit, there will be time enough for the lower courts to consider those other issues, informed by the decision in this case. Accordingly, the grant of certiorari should be limited to the first question presented, as restated in this brief in response.

CONCLUSION

The writ for certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
APR 17 1995
OFFICE OF THE CLERK

No. 94-1387

IN THE
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OCTOBER TERM, 1994

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

26pp

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Third Circuit incorrectly decided that the damages, if any, available to survivors of a victim of a fatal recreational boating accident which occurred in navigable territorial waters are determined under state law rather than according to the general federal maritime cause of action created by this Court in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970).

2. If the question presented above is decided affirmatively, petitioners also request that this Court decide the questions originally certified to the Third Circuit, to wit, whether, pursuant to the general maritime death action, respondents may recover: (1) damages for loss of society; (2) damages for lost future earnings; and/or (3) punitive damages.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
NATURE OF THE NMMA'S INTEREST	2
SUMMARY OF ARGUMENT	3
ARGUMENT: REASONS FOR GRANTING WRIT OF CERTIORARI	3
I. THE COURT OF APPEALS' DECISION MISINTERPRETS AND MISAPPLIES THIS COURT'S HOLDING IN *MORAGNE v. STATES MARINE LINES, INC.*	3
II. THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S TREATMENT OF MARITIME JURISDICTION AND THE HOLDINGS OF A NUMBER OF OTHER COURTS OF APPEALS AND STATE SUPREME COURTS	9
A. The Court Of Appeals' Decision Conflicts With This Court's Treatment Of Maritime Jurisdiction	10
B. The Court Of Appeals' Decision Conflicts With Holdings Of Other Courts Of Appeals In Similar Cases	11
C. The Court Of Appeals' Decision Also Conflicts With Holdings Of State Supreme Courts In Similar Cases	14
III. THE COURT OF APPEALS' DECISION UPSETS THE UNIFORMITY OF THE GENERAL MARITIME LAW AND CREATES ANOMALOUS RESULTS	15
CONCLUSION	20

TABLE OF AUTHORITIES

Cases	Page
American Dredging Co. v. Miller, —— U.S. ——, 114 S. Ct. 981 (1994)	16
Anderson v. Whittaker Corp., 692 F. Supp. 764 (W.D. Mich. 1988), *rev'd in part on other grounds*, 894 F.2d 804 (6th Cir. 1990)	13
Byrd v. Byrd, 657 F.2d 615 (4th Cir. 1981)	8
Calhoun v. Yamaha Motor Corp., U.S.A., 40 F.3d 622 (3d Cir. 1994)	*passim*
Chan v. Society Expeditions, Inc., 39 F.3d 1398 (9th Cir. 1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 196 (1995)	18, 19
Choat v. Kawasaki Motors Corp., 1994 A.M.C. 2626 (Ala. 1994)	14
East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986)	10
Evich v. Morris, 819 F.2d 256 (9th Cir.), *cert. denied*, 484 U.S. 914 (1987)	7
Foremost Insurance Co. v. Richardson, 457 U.S. 668 (1982)	10
Garner v. Dravo Basic Materials Co., 768 F. Supp. 192 (S.D. W. Va. 1991)	20
THE HARRISBURG, 119 U.S. 199 (1886)	4, 5
Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., —— U.S. ——, 115 S. Ct. 1043 (1995)	10
Kelly v. Panama Canal Comm'n, 26 F.3d 597 (5th Cir. 1994)	12-13
Matter of S/S HELENA, 529 F.2d 744 (5th Cir. 1976)	7, 8
Miles v. Apex Marine Corp., 498 U.S. 19 (1990)	*passim*
Mink v. Genmar Inds., Inc., 29 F.3d 1543 (11th Cir. 1994)	18
Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978)	5, 8
Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970)	*passim*
Nelson v. United States, 639 F.2d 469 (9th Cir. 1980)	7
Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986)	4, 7, 8, 14

TABLE OF AUTHORITIES—Continued

	Page
Penrod Drilling Corp. v. Williams, 868 S.W.2d 294 (Tex. 1993) (per curiam)	14
Powers v. Bayliner Marine Corp., 855 F. Supp. 199 (W.D. Mich. 1994)	20
Preston v. Frantz, 11 F.3d 357 (2d Cir. 1993) (per curiam), *cert. dismissed*, —— U.S. ——, 115 S. Ct. 31 (1994)	6-7
Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 (1974)	9
Shield v. Bayliner Marine Corp., 822 F. Supp. 81 (D. Conn. 1993)	20
Sinclair v. Soniform, Inc., 935 F.2d 599 (3d Cir. 1991)	10, 18
Sisson v. Ruby, 497 U.S. 358 (1990)	10, 16-17
Sutton v. Earles, 26 F.3d 903 (9th Cir. 1994)	13, 20
Texaco Refining & Mktg., Inc. v. Estate of Dau Van Tran, 808 S.W.2d 61 (Tex.), *cert. denied*, 502 U.S. 908 (1991)	14-15
Truehart v. Blandon, 672 F. Supp. 929 (E.D. La. 1987)	19
Wahlstrom v. Kawasaki Heavy Inds., Ltd., 4 F.3d 1084 (2d Cir. 1993), *cert. denied*, —— U.S. ——, 114 S. Ct. 1060 (1994)	*passim*
Walker v. Braus, 995 F.2d 77 (5th Cir. 1993)	13, 20
Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1955)	8
Statutes	
22 U.S.C. §§ 3772, 3776	13
28 U.S.C. § 1333	14
Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50	18
Inland Navigational Rules Act of 1980, 33 U.S.C. §§ 2001-73	11
Jones Act, 46 U.S.C. § 688	4, 15, 16, 18
Death on the High Seas Act, 46 U.S.C. §§ 761-68	*passim*
Federal Boat Safety Act of 1971, 46 U.S.C. §§ 4301-11	2, 11, 17
Other Authorities	
UNITED STATES COAST GUARD, BOATING STATISTICS 1993 (Commandant Pub. P16754.7)	11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1387

YAMAHA MOTOR CORPORATION, U.S.A. and
YAMAHA MOTOR COMPANY, LTD.,
Petitioners

v.

LUCIEN B. CALHOUN and ROBIN L. CALHOUN,
Individually and as Administrators of the
Estate of Natalie K. Calhoun, Deceased,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF *AMICUS CURIAE* OF THE NATIONAL MARINE MANUFACTURERS ASSOCIATION IN SUPPORT OF PETITIONERS

The National Marine Manufacturers Association ("NMMA") respectfully urges this Court to grant Yamaha Motor Corporation, U.S.A. and Yamaha Motor Company, Ltd.'s Petition for Writ of Certiorari and to issue a writ of certiorari to the United States Court of Appeals for the Third Circuit (the "Court of Appeals").*

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* Petitioners and Respondents have consented in writing to the NMMA filing this brief. Letters stating their consents have been filed with the Clerk of the Supreme Court.

NATURE OF THE NMMA'S INTEREST

The NMMA is an international, not-for-profit association of marine product manufacturers, who design, produce, and sell recreational boats, engines, parts, and other equipment. The NMMA was founded in 1906 and, today, has approximately 1,500 members. NMMA members produce approximately 80 percent of the marine products used by recreational boaters and fishermen in the United States. The recreational boating industry itself employs nearly 400,000 people in the United States with annual sales in excess of 11 billion dollars.

The fundamental purpose of the NMMA is to promote and encourage recreational boating and the recreational boating industry. The NMMA offers its members and the recreational boating industry a broad spectrum of programs and services, including technical advice and services, statistical analyses, participation in and support of trade shows, advertising, improvements in and advocacy of safety, and assistance in the export of members' products and services. To further this purpose, the NMMA participates regularly in litigation, as a party and as *amicus curiae*, and in activities involving governmental relations as they relate to the recreational boating industry. In addition, the design of the products manufactured and sold by the members of the NMMA must conform to the regulations the Secretary of Transportation (United States Coast Guard) has promulgated under the Federal Boat Safety Act, 46 U.S.C. §§ 4301-11. Accordingly, the NMMA coordinates a certification program that assures consumers that all boats and equipment that satisfy the NMMA certification requirements also meet these mandatory federal regulations as well as other voluntary safety and engineering standards, such as those of the American Boat and Yacht Council.

The Petition for Writ of Certiorari before this Court presents the question whether the general maritime law or state law should govern wrongful death actions

brought by the survivors of recreational boaters who are killed in territorial waters. The NMMA and its members are regularly involved in litigation throughout the United States, in federal and state courts, arising out of the deaths of recreational boaters in territorial waters. Consequently, the NMMA has a vital interest in the resolution of this question and in the establishment and maintenance of a uniform general maritime law because its membership must comply with mandatory federal standards and is subject to lawsuits in every state.

SUMMARY OF ARGUMENT

The Court of Appeals held that the law of state wrongful death and survival actions, not the general maritime law, governs the deaths of recreational boaters in territorial waters. The Court of Appeals' holding abandons this Court's opinion in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), which created a general maritime wrongful death action. Moreover, the Court of Appeals' decision conflicts with the overwhelming majority of federal courts of appeals and state supreme courts that have addressed similar cases. If left to stand, the Court of Appeals' holding will seriously impair the uniformity of maritime wrongful death remedies, thereby avoiding the consequences of this Court's recent decision in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990).

ARGUMENT: REASONS FOR GRANTING WRIT OF CERTIORARI

I. THE COURT OF APPEALS' DECISION MISINTERPRETS AND MISAPPLIES THIS COURT'S HOLDING IN *MORAGNE v. STATES MARINE LINES, INC.*

Before this Court's ruling in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), in 1970, the general maritime law afforded no wrongful death cause of action to the survivors of a person killed on either the high seas or in the territorial waters of the United States. *See*

Miles v. Apex Marine Corp., 498 U.S. 19, 23 (1990); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 212 (1986); *THE HARRISBURG*, 119 U.S. 199, 213-14 (1886). Instead, a decedent's survivors were left to seek recovery under state law. Such recovery was possible, however, only if state law specifically permitted it and, ordinarily, only if the death occurred within territorial waters. *Tallentire*, 477 U.S. at 212.

In 1920, Congress enacted two pieces of maritime legislation that significantly changed the face of wrongful death recovery under maritime law: the Jones Act, 46 U.S.C. § 688, and the Death on the High Seas Act ("DOHSA"), 46 U.S.C. §§ 761-68 (sometimes collectively the "1920 Acts"). The Jones Act provided the personal representative of a seaman killed in the course of employment a wrongful death action, based on negligence, against the seaman's employer. DOHSA created a similar right of recovery for the representative of anyone killed on the high seas. Unlike the Jones Act, DOHSA permitted actions based on unseaworthiness as well as negligence. *See Miles*, 498 U.S. at 25. As this Court later recognized, the Jones Act and DOHSA "established a policy in favor of maritime wrongful death recovery" and "a strong presumption in favor of a general maritime wrongful death action." *Id.* at 25.

Nevertheless, from 1920 to 1970, several serious gaps existed in the maritime law's wrongful death remedies. First, within territorial waters, the general maritime law provided a remedy for an unseaworthy vessel that injured an individual but not for one that caused the individual's death. *Miles*, 498 U.S. at 26; *Moragne*, 398 U.S. at 395. Second, DOHSA permitted recovery for a death on the high seas resulting from unseaworthiness, but the general maritime law did not allow such recovery for a similar death that occurred in territorial waters. *Miles*, 498 U.S. at 26; *Moragne*, 398 U.S. at 395. Lastly, a Jones Act seaman's survivors had no right of recovery if the seaman's death resulted from an unseaworthy condi-

tion. but the survivors of a longshoreman, a nonseaman, did where state law permitted recovery for unseaworthiness. *Miles*, 498 U.S. at 26; *Moragne*, 398 U.S. at 395-96. The anomalous results that this interplay between the 1920 Acts and state law produced caused "uncertainty and incongruity" in maritime law. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 621 (1978).

To fill these gaps, this Court recognized, for the first time in *Moragne*, a remedy for wrongful death under the general maritime law, overruling *THE HARRISBURG*. *Id.* *Moragne* involved the death of a longshoreman killed aboard a vessel in the territorial waters of Florida. The longshoreman's widow sued the owner of the vessel for the wrongful death of her husband and his pain and suffering, based upon both negligence and the unseaworthiness of the vessel. *Moragne*, 398 U.S. at 376. The vessel owner moved to dismiss the wrongful death claim premised on unseaworthiness, contending that maritime law did not permit recovery for a wrongful death within a state's territorial waters and Florida law did not recognize unseaworthiness as a basis of liability. *Id.* The district court dismissed the wrongful death-unseaworthiness claim, and, later, the court of appeals affirmed the district court's dismissal. *Id.* at 377.

This Court reversed the court of appeals' decision and, relying on the policies of uniformity inherent in the 1920 Acts and the general maritime law, fashioned a maritime wrongful death cause of action. *Miles*, 498 U.S. at 27. The *Moragne* Court reasoned that:

> Our recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts. Such uniformity not only will further the concerns of both of the 1920 Acts but also will give effect to the constitutionally based principle that federal admiralty

> law should be a "system of law coextensive with, and operating uniformly in, the whole country."

Moragne, 398 U.S. at 401-02 (citations omitted).

Nevertheless, the Court of Appeals held, in the present case, that the *Moragne* general maritime wrongful death remedy was not meant to preempt state wrongful death or survival actions. *Calhoun v. Yamaha Motor Corp., U.S.A.*, 40 F.3d 622, 639, 640 (3d Cir. 1994). In addition, the Court of Appeals determined that DOHSA "was affirmatively intended to preserve state wrongful death remedies for survivors of people killed in territorial waters." *Id.* at 642. Consequently, the Court of Appeals concluded that courts are free to apply state remedies to suits arising out of the deaths of nonseamen in territorial waters where "they do not conflict with whatever settled principles exist." *Id.* at 641.

The Court of Appeals' reasoning is, however, flawed. In *Moragne*, this Court expressly rejected the view that each state could supply its own remedy for deaths occurring in its territorial waters, which was the situation before the *Moragne* decision. Instead, the Court adopted a general maritime wrongful death remedy to promote the maritime goal of uniformity and noted that "[t]he incongruity of forcing the States to provide the sole remedy to effectuate duties that have no basis in state policy is highlighted in this case." *Moragne*, 398 U.S. at 401 n.15. Accordingly, the Court concluded that "[f]ederal law, rather than state, is the more appropriate source of a remedy for violation of the federally imposed duties of maritime law." *Id.* at 401 n.15. In recent years, this Court has returned to this fundamental principle of uniformity. *See Miles*, 498 U.S. at 29-30, 37.

The courts of appeals have recognized that this Court's holding in *Moragne* eliminated the rationale for the enforcement of state remedies in admiralty and, therefore, that the *Moragne* wrongful death remedy precludes recognition of those state remedies. *See, e.g., Preston v.*

Frantz, 11 F.3d 357 (2d Cir. 1993) (per curiam) (general maritime law survival action precludes the application of state survival actions), *cert. dismissed*, —— U.S. ——, 115 S. Ct. 31 (1994); *Wahlstrom v. Kawasaki Heavy Inds., Ltd.*, 4 F.3d 1084, 1088-89 (2d Cir. 1993) (*Moragne* wrongful death action precludes use of state wrongful death statutes), *cert. denied*, —— U.S. ——, 114 S. Ct. 1060 (1994); *Evich v. Morris*, 819 F.2d 256, 257-58 (9th Cir.) (*Moragne* precludes the use of state survival actions), *cert. denied*, 484 U.S. 914 (1987); *Nelson v. United States*, 639 F.2d 469, 473 (9th Cir. 1980) (general maritime wrongful death action precludes applying state wrongful death statutes); *Matter of S/S HELENA*, 529 F.2d 744, 753 (5th Cir. 1976) (same). The Court of Appeals' decision here is a radical departure from and seriously impairs the uniformity of maritime wrongful death remedies by returning to state law for maritime accidents occurring in territorial waters.

Moreover, the Court of Appeals' reliance on DOHSA is misplaced. While *Tallentire* addressed the effect of DOHSA on the application of state remedies, the Court's decision in that case did not consider *Moragne*'s impact on the use of state remedies. As both *Moragne* and *Tallentire* observed, when Congress enacted DOHSA in 1920, state law was the only law that could provide a remedy for a death suffered within state territorial waters. *Tallentire*, 477 U.S. at 212; *Moragne*, 398 U.S. at 393-94. As a result, in creating a federal statutory remedy for wrongful deaths on the high seas, Congress did not intend DOHSA to preempt those state laws that provided the only means of recovery for wrongful deaths in territorial waters in 1920. *See Miles*, 498 U.S. at 25; *Moragne*, 398 U.S. at 397-400. In contrast, this Court's holding fifty years later in *Moragne* obviated the need for resort to state wrongful death statutes by providing a wrongful death remedy under the general maritime law and thereby creating a uniform federal scheme for wrongful deaths in territorial waters as well as on the high

seas. *See Wahlstrom*, 4 F.3d at 1089; *Matter of S/S HELENA*, 529 F.2d at 753.

Thus, the *Moragne* wrongful death remedy controls the analysis the Court of Appeals employed.[1] Contrary to the Court of Appeals' suggestion, whether state law can provide the rule of decision in an admiralty case does not depend solely on whether the state law "conflicts" with substantive federal maritime principles. Instead, in an admiralty case, a court may look to state law only where no federal statute or general maritime law rule applies and, then, only if the state law does not "impair the uniformity and simplicity which is a basic principle of the federal admiralty law." *Byrd v. Byrd*, 657 F.2d 615, 617 (4th Cir. 1981) (discussing *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955)).

Here, *Moragne* has provided a general maritime rule governing wrongful deaths in territorial waters that courts cannot simply circumvent by resort to state law. Although *Moragne* left open a number of questions regarding the cause of action it created, this Court has held that "[a]s *Moragne* itself implied, DOHSA should be the courts' primary guide as they refine the nonstatutory death remedy, both because of the interest in uniformity and because Congress' considered judgment has great force in its own right." *Higginbotham*, 436 U.S. at 624. In

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[1] Perhaps the most fundamental flaw in the Court of Appeals' decision is its attempt to use a "preemption" analysis in determining whether to apply maritime law. *Calhoun*, 40 F.3d at 627-30 ("Whether a state law may provide a rule of decision in an admiralty case depends on whether the state rule 'conflicts' with the substantive principles of federal admiralty law."). The determination of whether maritime law applies is *not* resolved, however, according to preemption principles, but rather through choice-of-law principles. Once a court, including a state court, determines that maritime law governs, the court must apply the entirety of the substantive principles of federal maritime law. *See Tallentire*, 477 U.S. at 222-23. The issue-by-issue preemption analysis adopted by the Court of Appeals completely defeats the policy of uniformity espoused in *Moragne*.

its rush to apply state law, the Court of Appeals appears to have lost sight of the role this Court intended the *Moragne* right of recovery to play in establishing a more uniform federal system of recovery for wrongful deaths that occur on the territorial waters and high seas.[2]

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S TREATMENT OF MARITIME JURISDICTION AND THE HOLDINGS OF A NUMBER OF OTHER COURTS OF APPEALS AND STATE SUPREME COURTS.

The Court of Appeals concluded that maritime law had not addressed the factual situation before it and, therefore, that state law should apply.[3] *See Calhoun*, 40 F.3d at 628 n.7 ("The correct analytic conclusion, we believe, is that admiralty law simply has not spoken to the factual situation of this case, and that state laws accordingly apply of their own force."), 629 n.8 ("we discern no maritime law governing the plaintiffs' wrongful death and survival actions and no federal interest whose uniformity would be unconstitutionally impaired by application of state law."). Further, the Court of Appeals held that federal admiralty law does not supplant state

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[2] The Court of Appeals' clear, but unspoken, goal appears to have been to evade this Court's holding in *Miles*. There, recognizing the fundamental principle of uniformity that is the hallmark of the general maritime law, this Court established the parameters of damages that may be awarded in a wrongful death action under the general maritime law. *See Miles*, 498 U.S. at 37.

[3] The Court of Appeals used the terms "recreational boaters" and "nonseamen" interchangeably, making it difficult to determine whether its holding concerns only recreational boaters or nonseamen in general. Regardless, the discussion in this section demonstrates that maritime law has addressed the question of recreational boaters, and this Court has indicated that the general maritime wrongful death action governs claims by the survivors of nonseamen. *See, e.g., Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573 (1974) (considering the application of the *Moragne* wrongful death remedy to the survivors of longshoremen).

wrongful death or survival statutes for "deaths of recreational boaters (non-seamen) within territorial waters." *Id.* at 638, 643. Contrary to the Court of Appeals' assumption, however, a number of courts have addressed the same, or similar, factual scenario, and the overwhelming majority of these courts have determined that the general maritime law, not state law, governs the remedies at issue.

A. The Court Of Appeals' Decision Conflicts With This Court's Treatment Of Maritime Jurisdiction.

The Court of Appeals complained that the general maritime law had simply not addressed the question of recreational boating. Yet, on at least two occasions, this Court has made a point to include recreational boating within maritime jurisdiction. In *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982), and *Sisson v. Ruby*, 497 U.S. 358 (1990), this Court held that admiralty jurisdiction extends to recreational, and other noncommercial, boats. *See also Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, —— U.S. ——, 115 S. Ct. 1043, 1053 (1995) (discussing *Foremost Insurance* and *Sisson*).[4] As even the Court of Appeals admitted, " '[w]ith admiralty jurisdiction comes the application of substantive admiralty law.' " *Calhoun*, 40 F.3d at 626-27 (quoting *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864 (1986)).

This Court's decisions in *Foremost Insurance* and *Sisson* evince an intent to bring recreational boating within the domain of maritime law. It makes little sense to suggest that this Court would have extended admiralty jurisdiction to recreational boating simply to apply state law to torts involving recreational boats. If the Court really intended state law to govern torts relating to recreational

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[4] Indeed, the Third Circuit itself has held that admiralty jurisdiction includes recreational boaters. *See Sinclair v. Soniform, Inc.*, 935 F.2d 599, 602-03 (3d Cir. 1991).

boating, it would not have included recreational boating within admiralty jurisdiction. Instead, it would have been far simpler to leave recreational boating to the states and state law.

The Court of Appeals' suggestion that maritime law has not spoken to the subject of recreational boaters also ignores Congress' pronouncements in this area and the role of recreational boaters in today's maritime world. First, the Federal Boat Safety Act of 1971, 46 U.S.C. §§ 4301-11, grants the United States Coast Guard exclusive jurisdiction to regulate recreational boat design throughout the United States and expressly preempts the application of state law. Second, the federal rules of conduct on navigable waters, the Inland Navigational Rules Act of 1980, 33 U.S.C. §§ 2001-73, apply to "all vessels upon the inland waters of the United States" both commercial and noncommercial. Third, as discussed in greater detail below, DOHSA applies to deaths that occur on both commercial and noncommercial vessels on the high seas. Fourth, the Coast Guard estimates that currently over 20 million recreational boats travel the inland waters, ranging in size from under ten feet long to over 100 feet long and outnumbering commercial vessels on these waters. *See* UNITED STATES COAST GUARD, BOATING STATISTICS 1993 (Commandant Pub. P16754.7).

B. The Court Of Appeals' Decision Conflicts With Holdings Of Other Courts Of Appeals In Similar Cases.

In *Wahlstrom v. Kawasaki Heavy Industries, Ltd.*, the Second Circuit confronted the precise factual situation considered in *Calhoun*. 4 F.3d at 1084. *Wahlstrom* involved the death of a seventeen-year-old boy who was killed when the rented Kawasaki Jet Ski he was operating collided with a power boat on a river in Connecticut. After the accident, his parents sued the manufacturer of the jet ski under Connecticut products liability and con-

sumer protection laws, seeking compensatory and punitive damages and attorneys' fees. *Id.* The manufacturer moved for summary judgment, arguing that federal maritime law governed the suit and barred the parents' recovery under state law. The district court granted the motion, and the parents appealed.

On appeal, the parents contended that maritime law did not preclude the application of state wrongful death statutes and, if maritime law did apply, the court should fashion the federal remedy using the state wrongful death principles. The Second Circuit rejected both of these arguments and held that federal maritime law alone governed the parents' claims *whether or not it conflicted with state law*. *Id.* at 1087-88. The Second Circuit reasoned that:

> In our view, the Supreme Court's creation in *Moragne* of a federal wrongful death action under general maritime law precludes the use of state wrongful death statutes in maritime claims. Without such preclusive effect, "the tensions and discrepancies" resulting from application of state remedial statutes could not be removed.

Id. at 1089. Accordingly, the court considered whether maritime law recognized the various elements of damages the parents sought in their wrongful death and survival actions. *See id.* at 1089-94. Importantly, in the present case, the Court of Appeals was aware of the *Wahlstrom* decision but considered it only briefly in a footnote. *Calhoun*, 40 F.3d at 639 n.30.

In *Kelly v. Panama Canal Commission*, the survivors of an army captain who was killed when the mast of his recreational boat struck hanging electrical wires sued the responsible governmental authority, seeking damages for the captain's pain and suffering and for loss of society and support to his minor child and wife. 26 F.3d 597, 599 (5th Cir. 1994). The captain's widow sued under

22 U.S.C. §§ 3772, 3776, which permit the recovery of damages for injuries occurring in areas outside of the Panama Canal locks and provide that courts are to apply the same law and rules of practice that would govern similar cases between a private party and the United States. The Fifth Circuit held that the general maritime law applied because it "governs virtually all non-statutory tort actions occurring on navigable waters" and limited the plaintiffs' recovery to pecuniary losses under the general maritime law. *Id.* at 601-02. *See also Walker v. Braus,* 995 F.2d 77 (5th Cir. 1993) (recognizing that the general maritime law applied to the loss of consortium claims of the survivors of an individual killed when a chartered crew boat collided with his recreational fishing boat).

Similarly, the Sixth and Ninth Circuits have also applied general maritime law to wrongful death actions brought by the survivors of recreational boaters killed in territorial waters. In *Anderson v. Whittaker Corporation,* the district court and the Sixth Circuit applied maritime law to the wrongful death claims of the survivors and representatives of boaters who drowned when their recreational boat capsized while crossing Lake Michigan. 692 F. Supp. 764 (W.D. Mich. 1988), *rev'd in part on other grounds,* 894 F.2d 804 (6th Cir. 1990). In *Sutton v. Earles,* the Ninth Circuit held that the general maritime law determined the government's duty to boaters who died when their pleasure boat allided with a Navy mooring buoy in Huntington Harbor. 26 F.3d 903, 911-12 (9th Cir. 1994). The Ninth Circuit awarded wrongful death damages to the boaters' survivors and representatives based upon general maritime law. *Id.* at 915-20.

C. The Court Of Appeals' Decision Also Conflicts With Holdings Of State Supreme Courts In Similar Cases.[5]

In *Choat v. Kawasaki Motors Corporation*, an eighteen-year-old girl was killed when a jet ski, operated by another teenager, struck her in the head while she was lying on an inflatable float on a lake. 1994 A.M.C. 2626 (Ala. 1994). The girl's mother sued the jet ski manufacturer under Alabama law. The manufacturer moved for summary judgment, arguing that the mother's claims were subject to maritime jurisdiction and that maritime law did not recognize a nondependent's recovery for loss of society or punitive damages in a wrongful death action. The trial court granted the manufacturer's motion.

On appeal, the girl's mother contended that regardless of whether maritime law applied, the court should supplement substantive maritime law with the Alabama Wrongful Death Act. Relying on *Wahlstrom*, the Alabama Supreme Court held that federal maritime law applied to actions for wrongful deaths in territorial waters whether or not it conflicted with state law. *Id.* at 2628. Therefore, the court referred to the general maritime law in determining whether the girl's mother could recover for loss-of-society damages, punitive damages, and funeral expenses. *Id.* at 2639-42.

Likewise, the Texas Supreme Court applied general maritime law to the claims of the parents of a man who was crushed to death between a dock and a boat while

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[5] Under the "saving to suitors" clause of 28 U.S.C. § 1333, the survivors of recreational boaters killed in territorial waters may bring their wrongful death suits in state court even though such suits fall within the scope of admiralty jurisdiction. The state court must, however, apply substantive admiralty law where appropriate. *Tallentire*, 477 U.S. at 222-23; *Moragne*, 398 U.S. at 378 n.1. Consequently, state courts, as well as federal courts, may interpret and apply general maritime principles. Importantly, in determining the appropriate federal rule of decision, state courts are obligated to follow only higher state courts and the United States Supreme Court. Federal appellate and district court precedent may be persuasive, but it is not binding. *See Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993) (per curiam).

helping an elderly shrimp boat captain free his propeller. *See Texaco Refining & Mktg., Inc. v. Estate of Dau Van Tran*, 808 S.W.2d 61 (Tex.), *cert. denied*, 502 U.S. 908 (1991). The decedent was neither a seaman nor a longshoreman, and his parents brought suit under the Texas Wrongful Death and Survivorship Statutes. The Texas Supreme Court held that "[w]here applicable and properly invoked, general maritime law preempts state causes of action and remedies, consistent with the longstanding desire of Congress and the judiciary to achieve uniformity in the exercise of admiralty jurisdiction pursuant to the U.S. Constitution, art. 3, § 2, cl. 1." *Id.* at 64. Finding maritime jurisdiction, the court determined that the trial court had erred by failing to apply maritime law and its limited remedies. *Id.*

III. THE COURT OF APPEALS' DECISION UPSETS THE UNIFORMITY OF THE GENERAL MARITIME LAW AND CREATES ANOMALOUS RESULTS.

The Court of Appeals' decision deals a clear blow to the uniformity of maritime wrongful death remedies, which this Court most recently reaffirmed in *Miles*. If left to stand, the Court of Appeals' opinion permits (indeed, approves) the application of the wrongful death and survival statutes of each of the fifty states to the deaths of recreational boaters occurring within their territorial waters. The Court of Appeals justifies this disjointed outcome by attempting to downplay the vitality and significance of uniformity in defining maritime wrongful death principles.[6] *See Calhoun*, 40 F.3d at 636.

As discussed earlier, in *Moragne*, this Court stressed the need for a general maritime wrongful death action to

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[6] Curiously, at the same time, the Court of Appeals recognizes the current importance of federal statutes in the evolution of maritime death recovery. *See Calhoun*, 40 F.3d at 636. The role that federal statutes, such as the Jones Act and DOHSA, play in defining general maritime remedies demonstrates, however, the continued importance of uniformity to maritime wrongful death law.

assure the "uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts." *Moragne*, 398 U.S. at 401. The Court of Appeals failed to explain, however, what now justifies a return to the incongruous system this Court rejected in *Moragne* when state law supplied the rule of decision for deaths in territorial waters. Recently, this Court reaffirmed that "the extension of the DOHSA wrongful death action to territorial waters [in *Moragne*] furthers rather than hinders uniformity in the exercise of admiralty jurisdiction." *Miles*, 498 U.S. at 29-30.

The importance of achieving uniformity in maritime wrongful death remedies has remained undiminished since this Court's holding in *Moragne*. In *Miles*, the Supreme Court's most recent encounter with maritime wrongful death law, this Court sought to harmonize the general maritime wrongful death remedy with the remedies provided in the Jones Act and DOHSA. *Miles* emphasized that, in defining the damages recoverable in a general maritime cause of action for the wrongful death of a seaman, this Court acted "in accordance with the uniform plan of maritime tort law Congress created in DOHSA and the Jones Act." [7] *Id.* at 37. The Court of Appeals both ignores and attempts to circumvent this holding. Moreover, in *Sisson*, this Court observed that "[t]he need for uniform rules of maritime conduct and liability . . . extends at least to . . . activities traditionally undertaken by vessels, commercial or *noncommercial*."

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[7] This Court's decision in *American Dredging Co. v. Miller*, —— U.S. ——, 114 S.Ct. 981 (1994), is not to the contrary. In *American Dredging*, this Court distinguished between the importance of maintaining uniform substantive, as opposed to procedural, maritime rules. *Id.* at 988. In contrast to the doctrine of *forum non conveniens* addressed in *American Dredging*, the *Moragne* wrongful death action involves substantive maritime law and, thus, demands uniform application.

497 U.S. at 367 (emphasis added). Congress also has indicated the importance of having uniform federal rules govern the safety of recreational boats in the Federal Boat Safety Act. *See* 46 U.S.C. § 4306 (preempting states from establishing or enforcing any safety provisions different from those provided by the Act).

In fact, if this Court chooses not to review the Court of Appeals' decision, a lack of uniformity will result at two different levels. First, the various federal courts will be free to apply either federal or state remedies to wrongful death actions involving recreational boaters killed in territorial waters. In addition, each state court will be equally free to choose between federal and state wrongful death remedies for deaths in their territorial waters.[8] As a result, a plaintiff's recovery will depend primarily on where the death occurs. If the boater is killed in a state in which the state and federal courts apply maritime law to a survivor's wrongful death action, one set of rules will govern. If, on the other hand, the state and federal courts have adopted state laws as the rule of decision, a separate set of rules will apply.

Where the federal courts and state courts in the same state choose to apply different law, inaction by this Court will enable survivors of recreational boaters killed in territorial waters to "shop" between the federal and state fora. Thus, for example, if a state supreme court decides that state wrongful death law should apply to the deaths of recreational boaters killed in the state's territorial waters but the federal court of appeals for the circuit including that state opts to follow maritime law under the same circumstances, the plaintiffs will have the choice of filing suit in whichever court promises greater recovery. The confusion and lack of uniformity that such a scenario will likely produce argues strongly in favor of the Court granting certiorari in this case.

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[8] As discussed above, the state courts have concurrent jurisdiction and must follow only the supreme court for the state in which they sit and the United States Supreme Court.

Further, permitting the Court of Appeals' decision to stand, or affirming its holding, will foster anomalous situations akin to those this Court addressed and sought to remedy in *Moragne*. First, the Court of Appeals' ruling results in the application of state law to deaths of recreational boaters in territorial waters but federal maritime law, in the form of DOHSA and the general maritime law, to such deaths on the high seas. Second, under the Court of Appeals' holding, if a boater dies in territorial waters, state law governs his or her survivors' wrongful death and survival actions. If, on the other hand, the boater is merely injured in territorial waters, the general maritime law controls the boater's recovery for his or her injuries. *Cf. Chan v. Society Expeditions, Inc.*, 39 F.3d 1398 (9th Cir. 1994) (applying general maritime law to determine damages available to injured passenger in suit against cruise line), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 196 (1995); *Mink v. Genmar Inds., Inc.*, 29 F.3d 1543 (11th Cir. 1994) (applying maritime statute of limitations to suit by injured passenger of pleasure boat against manufacturer); *Sinclair*, 935 F.2d at 603 ("The standards defining the duty of care owed to passengers [recreational scuba divers on a commercial dive boat] relate to a traditional goal of admiralty law, the provision of a uniform body of law to provide remedy for those injured while traveling on navigable waters.").

Finally, under the Court of Appeals' holding, the survivors of recreational boaters killed in territorial waters are entitled to recover under the applicable state wrongful death and survival statutes. In contrast, survivors of a seaman who dies in territorial waters may recover only under the Jones Act and general maritime law. Likewise, survivors of a longshoreman who dies in territorial waters may recover only compensation benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50, and under the general maritime law. The remedies available to the survivors of seamen and longshoremen under the applicable statutes and general mari-

time law may often be more limited than those under the state acts.[9]

The Court of Appeals rationalizes this incongruity by reasoning that often in maritime personal injury and death cases the status of the injured party determines the available remedies. *Calhoun*, 40 F.3d at 643-44. Traditionally, however, courts have showed a special solicitude to the members of a vessel's crew and their families, focusing on status only to protect seamen, above other maritime workers, as wards of the admiralty court. *See, e.g., Miles*, 498 U.S. at 36 (recognizing "that admiralty courts have always shown a special solicitude for the welfare of seamen and their families"); *Moragne*, 398 U.S. at 386-88, 395-96 (creating general maritime wrongful death action, in part, to correct anomalous situation in which longshoremen, but not seamen, had unseaworthiness remedy for deaths within territorial waters); *Chan*, 39 F.3d at 1407 ("We should also, where possible, be guided by the twin aims of maritime law: achieving uniformity in the exercise of admiralty jurisdiction and providing special solicitude to seamen."). *Wahlstrom*, 4 F.3d at 1092 (refusing to expand the class of beneficiaries of nonseamen who may recover for loss of society following this Court's denial of such recovery to seamen's beneficiaries); *Truehart v. Blandon*, 672 F. Supp. 929, 937 (E.D. La. 1987) ("General maritime law is its most generous to seamen, the wards of admiralty.").

The Court of Appeals' holding turns this ancient principle on its head. Here, the Court of Appeals gives more

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[9] **The Court of Appeals' decision is likely to generate additional confusion in the application of maritime law. What law will apply to a nonseaman, for example, a passenger, who dies aboard a commercial vessel in territorial waters? In addition, what law will apply in a case where a recreational boat and a commercial vessel collide, causing the deaths of recreational boaters as well as members of the crew of the commercial vessel? If the Court of Appeals' decision stands, different law will apply to different causes of action arising from the same casualty. This result contradicts the uniformity of maritime wrongful death remedies this Court sought to promote in *Miles*.**

generous remedies to those whose livelihood in no way involves work on navigable waters. Under the Court of Appeals' holding, the parents of a teenager fatally injured on a jet ski would be entitled to greater recovery than the parents of a crewmember of a commercial vessel who died while working aboard the vessel. In doing so, the Court of Appeals abandons the special solicitude shown by admiralty for seamen and their families by extending greater remedies to those who are killed while playing in territorial waters than those who are killed while working in the same waters.[10]

CONCLUSION

The National Marine Manufacturers Association respectfully urges this Court to grant the Petition for Writ of Certiorari so as to resolve the conflict among the courts and reestablish a uniform rule consistent with this Court's precedents.

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[10] The NMMA respectfully suggests that should this Court grant certiorari it consider whether the general maritime death action permits recovery of (1) damages for loss of society; (2) damages for lost future earnings; and/or (3) punitive damages, Petitioner's second question presented, so as to end the confusion that has arisen in the lower courts on these issues. *See, e.g., Sutton*, 26 F.3d at 916-17 (not applying *Miles* to general maritime law recoveries for deaths of nonseamen); *Wahlstrom*, 4 F.3d at 1091, 1094 (not applying *Miles* to loss-of-society claims but considering it with respect to claim for punitive damages for death of nonseaman); *Walker*, 995 F.2d at 84 (recognizing that *Miles* may govern nonseamen's general maritime law remedies) (dictum); *Powers v. Bayliner Marine Corp.*, 855 F. Supp. 199, 200-03 (W.D. Mich. 1994) (not applying *Miles* to loss-of-society and punitive damages claims for deaths of nonseamen); *Shield v. Bayliner Marine Corp.*, 822 F. Supp. 81, 83 (D. Conn. 1993) (applying *Miles* to general maritime survival action for death of nonseaman); *Garner v. Dravo Basic Materials Co.*, 768 F. Supp. 192, 194-95 (S.D. W. Va. 1991) (not applying *Miles* to general maritime wrongful death action for death of nonseaman).

Respectfully submitted,

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April 17, 1995

BEST AVAILABLE COPY

(4)

No. 94-1387

Supreme Court, U.S.
FILED
JUL 5 1995
CLERK

In The

Supreme Court of the United States

October Term, 1994

YAMAHA MOTOR CORPORATION, U.S.A. and
YAMAHA MOTOR COMPANY, LTD.,

Petitioners,

v.

LUCIEN B. CALHOUN and ROBIN L. CALHOUN,
Individually and as Administrators of the
Estate of Natalie K. Calhoun, Deceased,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

JOINT APPENDIX

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Petition For Certiorari Filed February 17, 1995
Certiorari Granted May 22, 1995

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TABLE OF CONTENTS

Page

Chronological List of Relevant Docket Entries

United States District Court for the Eastern District of Pennsylvania 1

Third Circuit Court of Appeals 10

Letter Briefs requested by the Third Circuit Court of Appeals discussing *American Dredging v. Miller*, 510 U.S. ___, 114 S.Ct. 981 (1994)

Yamaha's Letter Brief (April 20, 1994)..... 16

Calhouns' Letter Brief (April 20, 1994) 24

Order issued by the United States Supreme Court granting Certiorari (May 22, 1995) 40

The following opinions, decisions, judgments and orders have been omitted from this joint appendix since they appear on the designated pages of the appendix to the printed Petition for Certiorari:

Stipulation to Dismiss Certain Defendants, approved by District Court (Feb. 12, 1991)..... 99a

Orders and Memorandum Opinion, U.S. District Court for the Eastern District of Pennsylvania, Civil Action No. 90-4295 (Mar. 19, 1992 and Dec. 29, 1992) (Bench Opinion recited Dec. 24, 1992 and issued by the court on June 17, 1993) ... 52a

Order and Memorandum Opinion Denying Motion for Reconsideration of District Court's December 29, 1992 Order and Granting Motion for Certification to the Court of Appeals Pursuant to 28 U.S.C.A. § 1292(b) (June 3, 1993)..... 83a

JOINT APPENDIX – Continued

Order and Memorandum Opinion Amending District Court's June 3, 1993 Order for Certification to Include Questions Raised By Plaintiffs (June 21, 1993) 90a

Orders, Third Circuit Court of Appeals, granting Petition to Appeal Interlocutory Order pursuant to Fed.R.App.P. 5(a) and Consolidating Appeals (July 16, 1993) 97a

Transcript of Oral Argument before the Third Circuit Court of Appeals (April 13, 1994) 101a

Opinion of the United States Court of Appeals for the Third Circuit, Cross-Appeals Nos. 93-1736 and 1737 (3d Cir. Nov. 2, 1994) 1a

Judgment (Nov. 2, 1994) 44a

Order Amending Opinion (Nov. 17, 1994) 47a

Order Denying Petition for Rehearing With Suggestion for Rehearing In Banc (Dec. 7, 1994) 50a

U.S. District Court
U.S. District Court of Eastern Pennsylvania (Philadelphia)

CIVIL DOCKET FOR CASE: # 90-CV-4295

CALHOUN, et al. v.
YAMAHA MOTOR CORP., et al.

Filed: 06/27/90

Assigned to:
JUDGE LOUIS H. POLLAK
Demand: $50,000
Lead Docket: None
Dkt# in other court: None

Jury demand: Plaintiff
Nature of Suit: 365
Jurisdiction: Diversity

Cause: 28:1332 Diversity-Personal Injury

LUCIEN B. CALHOUN and
ROBIN L. CALHOUN,
individually and as
Administrators of the Estate
of Natalie K. Calhoun,
deceased

PLAINTIFFS

v.

WILLIAM J. TAYLOR
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YAMAHA MOTOR
CORPORATION, U.S.A. and
YAMAHA MOTOR CO., LTD.

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PALMAS DEL MAR CO
PALMAS DEL MAR, INC
PALMAS YACHT CLUB
MARINA DE PALMAS
YACHT CLUB, INC.
MAXXAM PROPERTIES
ABC CORPORATION
XYZ PARTNERSHIP
CANDELERO HOTEL CORP
MARINA DE PALMAS
SHIPYARD, INC.

DEFENDANTS

6/27/90	1	Complaint.
6/27/90	–	Demand for jury trial by PLAINTIFF ROBIN L. CALHOUN, PLAINTIFF LUCIEN B. CALHOUN
8/10/90	4	Amended complaint by PLAINTIFF ROBIN L. CALHOUN, PLAINTIFF LUCIEN B. CALHOUN
12/14/90	26	Stipulation of dismissal as to DEFENDANT PALMAS DEL MAR, INC., DEFENDANT PALMAS DEL MAR, CO., DEFENDANT PALMAS YACHT CLUB, DEFENDANT MARINA DE PALMAS, DEFENDANT MAXXAM PROPERTIES, DEFENDANT CANDELERO HOTEL CORP., DEFENDANT MARINA DE PALMAS SHIPYARD, INC.
2/12/91	–	STIPULATION AND ORDER, DISMISSING CERTAIN DEFTS (SIGNED BY JUDGE LOUIS H. POLLAK)
11/27/91	47	MOTION by DEFENDANT YAMAHA MOTOR CO., DEFENDANT YAMAHA MOTOR CORP FOR PARTIAL SUMMARY JUDGMENT, MEMORANDUM.
1/10/92	49	Response in opposition by PLAINTIFF ROBIN L. CALHOUN and PLAINTIFF LUCIEN B. CALHOUN to DEFENDANTS' [47-1] MOTION FOR PARTIAL SUMMARY JUDGMENT; Oral Argument Requested.

1/27/92	50	Memorandum by DEFENDANT YAMAHA MOTOR CO., DEFENDANT YAMAHA MOTOR CORP in support of [47-1] MOTION FOR PARTIAL SUMMARY JUDGMENT.
2/4/92	52	ORDER, FOR ORAL ARGUMENT ON 2-21-92 AT 11:00 a.m. (SIGNED BY JUDGE LOUIS H. POLLAK)
2/14/92	53	Reply by PLAINTIFF ROBIN L. CALHOUN, PLAINTIFF LUCIEN B. CALHOUN to response to [47-1] MOTION FOR PARTIAL SUMMARY JUDGMENT.
2/26/92	55	Reply by DEFENDANT YAMAHA MOTOR CO., DEFENDANT YAMAHA MOTOR CORP to response to [47-1] MOTION FOR PARTIAL SUMMARY JUDGMENT.
3/6/92	57	Plffs' rebuttal to response of defts Yamaha Motor Corporation, U.S.A. and Yamaha Motor Company, LTD's response to plffs' sur-reply brief regarding defts' motion for partial summary judgment.
3/19/92	58	ORDER GRANTING IN PART AND CONTINUING IN PART DEFTS MOTION FOR PARTIAL SUMMARY JUDGMENT; PARTIES ARE DIRECTED TO SUBMIT THEIR ADDITIONAL BRIEFS TO THE COURT BY 4-3-92 (SIGNED BY JUDGE LOUIS H. POLLAK)
4/3/92	61	Pffs' post-argument brief regarding damages and admiralty law.

4/3/92	62	Brief by DEFENDANT YAMAHA MOTOR CO., DEFENDANT YAMAHA MOTOR CORP in support of [47-1] MOTION FOR PARTIAL SUMMARY JUDGMENT.
4/15/92	63	Response by DEFENDANT YAMAHA MOTOR CORP, DEFENDANT YAMAHA MOTOR CO. to plffs' [61-1] post-argument brief regarding damages in admiralty law.
4/15/92	64	Reply by PLAINTIFF ROBIN L. CALHOUN, PLAINTIFF LUCIEN B. CALHOUN to defts' [62-1] supplemental brief regarding various issues of maritime damages submitted in support of defts' motion for partial summary judgment.
10/7/92	65	ORDER THAT ORAL ARGUMENT ON DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT WILL BE HELD ON 11/16/92 AT 10:15 IN COURTROOM 16-B. (SIGNED BY JUDGE LOUIS H. POLLAK).
12/29/92	67	ORDER THAT FOR THE REASONS GIVEN IN THE BENCH OPINION OF 12/24/92, IT IS HEREBY ORDERED THAT THE MOTION OF YAMAHA DEFENDANTS FOR PARTIAL SUMMARY JUDGMENT ON CERTAIN DAMAGE CLAIMS IS DENIED WITH RESPECT TO PLAINTIFFS' CLAIMS FOR (a) DAMAGES FOR LOSS OF SUPPORT

		AND SERVICES AND (b) DAMAGES FOR LOSS OF SOCIETY; AND GRANTED WITH RESPECT TO PLAINTIFFS' CLAIMS FOR (a) DAMAGES FOR LOSS OF FUTURE EARNINGS AND (b) PUNITIVE DAMAGES. (SIGNED BY JUDGE LOUIS H. POLLAK)
2/12/93	72	MOTION BY DEFENDANT YAMAHA MOTOR CO., DEFENDANT YAMAHA MOTOR CORP FOR RECONSIDERATION OF [67-1] ORDER WHICH DENIED YAMAHA'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS REGARDS DAMAGES FOR LOSS OF SOCIETY UNDER MARITIME LAW, OR, IN THE ALTERNATIVE TO CERTIFY THIS ISSUE FOR APPEAL, MEMORANDUM.
2/18/93	73	Response by PLAINTIFF ROBIN L. CALHOUN, PLAINTIFF LUCIEN B. CALHOUN in opposition to DEFENDANTS' [72-1] MOTION FOR RECONSIDERATION OF [67-1] ORDER, Memorandum.
2/23/93	75	Reply Brief by DEFENDANT YAMAHA MOTOR CO., DEFENDANT YAMAHA MOTOR CORP in support of [72-1] MOTION FOR RECONSIDERATION OF [67-1] ORDER.
6/2/93	78	Supplemental Brief in Support of DEFENDANT YAMAHA MOTOR

		CO., DEFENDANT YAMAHA MOTOR CORP of their Motion for Reconsideration.
6/2/93	79	ORDER DENYING DEFENDANTS' [72-1] MOTION FOR RECONSIDERATION OF [67-1] ORDER; AND GRANTING DEFENDANTS' [72-2] MOTION TO CERTIFY THIS ISSUE FOR APPEAL (SIGNED BY JUDGE LOUIS H. POLLAK)
6/9/93	82	MOTION BY PLAINTIFF ROBIN L. CALHOUN, PLAINTIFF LUCIEN B. CALHOUN TO AMEND [79-1] ORDER, TO CERTIFY FOR INTERLOCUTORY APPEAL THE ORDER ENTERED ON 12/29/92, AND TO STAY PROCEEDINGS, MEMORANDUM.
6/21/93	84	MEMORANDUM OPINION (SIGNED BY JUDGE LOUIS H. POLLAK)
6/21/93	85	MEMORANDUM AND ORDER THAT THE CERTIFICATION PURSUANT TO 28 U.S.C. SECTION 1292(d) CONTAINED IN THE ORDER OF 6/3/93 IS HEREBY AMENDED, ETC.; AND STAYING PROCEEDINGS IN THIS COURT PENDING WHATEVER ACTION MAY BE TAKEN BY THE COURT OF APPEALS WITH RESPECT TO THE QUESTIONS CERTIFIED TO THAT COURT IN PARAGRAPH 1 OF THIS ORDER PURSUANT TO 28 U.S.C. SECTION 1292(d). (SIGNED BY JUDGE LOUIS H. POLLAK)

7/13/93	87	ORDER THAT THE CLERK OF COURT MARK THIS ACTION CLOSED FOR STATISTICAL PURPOSES AND PLACE THE MATTER IN THE CIVIL SUSPENSE FILE, ETC. (SIGNED BY JUDGE LOUIS H. POLLAK)
7/19/93	88	Certified copy of order from U.S. Court of Appeals RE: Petition for permission to appeal from an Interlocutory Order pursuant to 28 U.S.C. Section 1292(b) and F.R.A.P. 5(a); Petition is granted. Judge Nygaard would deny the petition. (Court of Appeals No. 93-8054)
7/19/93	89	Certified copy of order from U.S. Court of Appeals RE: Petition for permission to appeal from an Interlocutory Order pursuant to 28 U.S.C. Section 1292(b) and F.R.A.P. 5(a); Petition is granted. This appeal will be consolidated with the appeal at Court of Appeals No. 93-8054. (Court of Appeals No. 93-8063)
7/30/93	–	Notice of Docketing ROA from USCA; USCA NUMBER: 93-1736.
7/30/93	–	Notice of Docketing ROA from USCA; USCA NUMBER: 93-1737.
9/2/93	–	RECORD COMPLETE FOR PURPOSES OF APPEAL.

12/15/94	91	Certified copy of order from USCA dated 12/15/94, that on consideration whereof, it is now hereby ordered and adjudged by this Court that the order of the said District Court entered 12/29/92, which was certified for immediate interlocutory appeal pursuant to 28 U.S.C. Sec. 1292(b) by order entered 6/3/93, which, in turn, was amended by order entered 6/21/93, be and the same is hereby affirmed with respect to the denial of defendant's motion for summary judgment on loss of society and loss of support damages, but reversed with respect to the grant of defendant's motion for summary judgment on lost future earnings and punitive damages. The parties shall bear their own costs.
1/4/95	92	ORDER THAT A STATUS CONFERENCE WILL BE HELD ON WEDNESDAY, 1/11/95 AT 4:30 P.M. (SIGNED BY JUDGE LOUIS H. POLLAK)
1/19/95	95	Minute entry: Status Conference held 1/19/95. Court addresses counsel. Counsel Dryer addresses court re: deft. is preparing petition for certiorari seeking Supreme Court review. Counsel Taylor addresses the court. Court agrees that this case should remain in suspense pending the outcome of the petition for certiorari.

1/20/95	96	ORDER THAT IT APPEARING TO THE COURT THAT THE ABOVE ENTITLED CASE SHOULD BE TRANSFERRED FROM THE CIVIL SUSPENSE FILE, IT IS ORDERED THAT THE CLERK OF COURT TRANSFER SAID CASE FROM THE CIVIL SUSPENSE FILE TO THE CURRENT DOCKET FOR FINAL DISPOSITION. (SIGNED BY JUDGE LOUIS H. POLLAK)
1/20/95	97	ORDER THAT THIS CASE IS TO BE RETURNED TO SUSPENSE PENDING THE SUPREME COURT'S DISPOSITION OF THE CERTIORARI PETITION. IF THE PETITION IS DENIED, THE CASE WILL THEN BE WITHDRAWN FROM SUSPENSE. IF THE PETITION IS GRANTED, THE CASE WILL REMAIN IN SUSPENSE UNTIL THE SUPREME COURT DETERMINES THE MERITS. (SIGNED BY JUDGE LOUIS H. POLLAK)

GENERAL DOCKET FOR
Third Circuit Court of Appeals

Filed: 7/30/93

Court of Appeals Docket: # 93-1736 (Appeal) and 93-1737 (Cross-Appeals)
Nsuit: 4365 P.I.: Product Liability
Calhoun, et al. v. Yamaha Motor Corp., et al.
Appeal from: Eastern District of Pennsylvania

Lower court information:

District: 0313-2 : 90-04295
Trial Judge: Louis H. Pollak, District Judge
Date Filed: 6/27/90
Date order/judgment: 7/16/93
Date NOA filed: 7/16/93

Fee status: paid

Prior cases:

None

Current cases:

Lead	Member	Start	End
Cross-appeal:			
93-1736	93-1737	7/30/93	12/15/94

LUCIEN B. CALHOUN and ROBIN L. CALHOUN, individually and as Administrators of the Estate of Natalie K. Calhoun, deceased

Appellees

v.

YAMAHA MOTOR CORP, U.S.A. and YAMAHA MOTOR CO, LTD

Appellants

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LUCIEN B. CALHOUN; ROBIN L. CALHOUN, individually and as Administrators of the Estate of Natalie K. Calhoun, deceased

v.

YAMAHA MOTOR CORPORATION, U.S.A.;
YAMAHA MOTOR CO., LTD.;
PALMAS DEL MAR COMPANY; PALMAS DEL MAR, INC.;
PALMAS YACHT CLUB, INC.; MARINA DE PALMAS YACHT CLUB, INC.;
MAXXAM PROPERTIES, INC.; ABC CORPORATION;
XYZ PARTNERSHIP(S); CANDELERO HOTEL CORPORATION;
MARINA DE PALMAS SHIPYARD, INC.

Yamaha Motor Corporation, U.S.A. and Yamaha Motor Company, Ltd.,

Appellants

7/30/93	CIVIL CASE DOCKETED. Notice filed by Yamaha Motor Corporation, U.S.A. & Yamaha Motor Company, Ltd. [93-1736 (Appeal)]
7/30/93	CIVIL CASE DOCKETED. Notice filed by Lucien B. Calhoun and Robin L. Calhoun, individually and as Administrators of the Estate of Natalie K. Calhoun, deceased. [93-1737 (Cross-Appeal)]
8/6/93	APPEARANCE from Attorney Jonathan Dryer on behalf of Appellants Yamaha Motor Corporation, USA & Yamaha Motor Co., Ltd., filed.
8/6/93	INFORMATION STATEMENT on behalf of Appellants Yamaha Motor Corporation, USA & Yamaha Motor Co., Ltd., RECEIVED.
8/6/93	(POSITIVE) DISCLOSURE STATEMENT filed on behalf of Appellant Yamaha Motor Corp advising: Yamaha Motor Co., Ltd., a publicly traded company owns 100% of the stock of Yamaha Motor Corp., USA.
8/11/93	BRIEFING NOTICE ISSUED: Appellant/ cross-appellee br and apx due 9/20/93, filed.
8/12/93	APPEARANCES from Attorneys William J. Taylor & Thomas A. Masterson, Jr. on behalf of Appellees Lucien B. Calhoun & Robin L. Calhoun, filed.
8/12/93	DISCLOSURE STATEMENT on behalf of Appellees Lucien B. Calhoun & Robin L. Calhoun, filed.

9/17/93	1ST STEP BRIEF and APPENDIX on behalf of Yamaha Motor Corp and Yamaha Motor Co Ltd. Pages: 48, Delivered by mail, filed. Certificate of Service dated 9/17/93.
10/18/93	2ND STEP BRIEF on behalf of Lucien B. Calhoun and Robin L. Calhoun. Pages: 48, Copies: 10, Delivered by mail, filed. Certificate of service date 10/18/93.
11/19/93	3RD STEP BRIEF on behalf of Yamaha Motor Corp and Yamaha Motor Co Ltd. Pages: 50 Copies: 10 Delivered by mail. Certificate of service date 11/19/93.
12/6/93	4TH STEP BRIEF on behalf of Lucien B. Calhoun and Robin L. Calhoun. Copies: 10 Delivered by mail. Certificate of service date 12/6/93.
1/13/94	CALENDARED for Wednesday, April 13, 1994. Rescheduled.
4/13/94	ARGUED 4/13/94 Panel: Becker, Mansmann and Scirica, Circuit Judges. At oral argument the Court requested counsel to file an original and 3 copies of memo in letter form on American Dredging case within one week.
4/20/94	ANSWER received in accordance with the Court's request of 4/13/94 from Appellees/Cross-Appellants Lucien B. Calhoun and Appellee Robin L. Calhoun in 93-1736 and 93-1737, filed.

4/20/94	ANSWER received in accordance with the Court's request of 4/13/94 from Appellants/Cross-Appellees Yamaha Motor Corp and Yamaha Motor Co Ltd in 93-1736 and 93-1737, filed.
6/29/94	LETTER dated 6/29/94 received pursuant to Rule 28(j) from counsel for Appellants/Cross-Appellees Yamaha Motor Corp and Yamaha Motor Co Ltd in 93-1736 and 93-1737.
11/2/94	OPINION (Becker, Authoring Judge, Mansmann, Scirica, Circuit Judges), filed.
11/2/94	JUDGMENT: Affirmed in part and reversed in part. Parties bear their own costs, filed.
11/16/94	PETITION by Yamaha Motor Corp et al in 93-1736, in 93-1737 for rehearing in banc. Certificate of service dated 11/16/94, filed.
11/17/94	ORDER AMENDING OPINION Becker, Authoring Judge, Mansmann, Scirica, Circuit Judges, filed.
12/7/94	ORDER (Sloviter, Chief Judge, Becker, Authoring Judge, Stapleton, Mansmann, Greenberg, Hutchinson, Scirica, Cowen, Nygaard, Alito, Roth, Lewis, McKee, Sarokin, Circuit Judges) denying petition for in banc rehearing by Appellant Yamaha Motor Corp, Yamaha Motor Co Ltd, Appellee Yamaha Motor Corp, Yamaha Motor Co Ltd. in 93-1736, 93-1737, filed.

12/15/94	MANDATE ISSUED, filed. (93-1737)
1/30/95	REPORTER at 40 F.3d: 622
2/24/95	Supreme Court of U.S. notice filed advising petition for writ of certiorari filed by Appellant Yamaha Motor Corp in 93-1736, Appellant Yamaha Motor Co Ltd in 93-1736, Appellee Yamaha Motor Corp in 93-1737, Appellee Yamaha Motor Co Ltd in 93-1737. Filed in the Supreme Court on 2/17/95 at Supreme Ct. case number: 94-1387.
5/25/95	Order Allowing Certiorari: U.S. Supreme Court order dated 5/22/95 at S.C. number: 94-1387, granting petition for writ of certiorari by Appellant Yamaha Motor Corp, et al. in 93-1736, 93-1737, LIMITED to question 1 presented by the petition. In addition to question 1 presented by the petition, the parties are requested to brief & argue the following question: "Under 28 USC Sec 1292(b), can the Court of Appeals exercise jurisdiction over any question that is included w/in the order that contains the controlling question of law identified by the District court?", filed.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER

The Curtis Center Suite 830 E
Independence Square West Philadelphia, PA 19106

[Rest Of Letterhead Omitted In Printing]

April 20, 1994

Clerk of the Court
United States Court of Appeals
for the Third Circuit
21400 United States Courthouse
601 Market Street
Philadelphia, PA 19106

Attention: P. Douglas Sisk

Re: Lucien B. Calhoun, et al. v. Yamaha Motor Corporation, U.S.A., et al.
Docket Nos. 93-1736/1737
Our File No.: 00210.29423

Dear Mr. Sisk:

We are writing at the invitation of Judges Becker, Mansmann and Scirica to address the impact of *American Dredging Co. v. Miller*, 114 S.Ct. 981 (1994), first cited by counsel for the Calhouns during the oral argument in this matter which took place on April 13, 1994. Upon review of this opinion, it is apparent that the Calhouns' citation of this case is most noteworthy as further evidence of their fundamental misunderstanding of the interplay between state and federal considerations in the law of admiralty. The *American Dredging* opinion not only fails to stand for the proposition for which it was cited by the

Calhouns (that state wrongful death and survival statutes remain applicable in territorial waters), it in fact confirms precisely the opposite, as Yamaha has argued throughout the course of this action: the creation of a uniform federal common law maritime remedy has precluded the further applicability of substantive state remedial statutes.

The *American Dredging* case arose when plaintiff, a seaman on a tugboat owned by American Dredging Company, was injured while in the course of his employment in Pennsylvania. After receiving medical treatment in Pennsylvania, New York and Mississippi, he eventually filed suit in Louisiana state court seeking damages under the Jones Act and general maritime law. American Dredging filed a motion to dismiss the action under the doctrine of *forum non conveniens* which was granted by the trial court, holding it was bound by federal law to apply the doctrine. After the Louisiana Court of Appeals for the Fourth District affirmed, the Supreme Court of Louisiana reversed, upholding the validity and applicability of Article 123(C) of the Louisiana Code of Civil Procedure, which renders the doctrine of *forum non conveniens* unavailable in Jones Act and maritime law cases brought in Louisiana state court. American Dredging filed a petition for writ of certiorari, which was granted by the United States Supreme Court. The issue before the Supreme Court was whether the Louisiana statute abolishing *forum non conveniens* had been preempted by federal maritime law.

In order to determine whether federal law was preemptive, the court recognized the traditional coextension of state and federal admiralty jurisdiction:

> In exercising *in personam* jurisdiction, however, a state court may "adopt such remedies, and . . . attach them to such incidents, as it sees fit" so long as it does not attempt to make changes in the "substantive maritime law" . . . That proviso is violated when the state remedy "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations."

American Dredging, 114 S.Ct. at 985 (*citations omitted*). Concluding the doctrine of *forum non conveniens* was neither a characteristic feature of admiralty nor a doctrine whose uniform application is necessary to maintain the harmony of maritime law, the court determined the Louisiana statute did not impermissibly intrude into the province of federal maritime law.

The court's reasoning in deciding *forum non conveniens* is not a characteristic feature of admiralty is not germane to this appeal. However, the discussion of uniformity is both highly relevant and, contrary to the arguments advanced by the Calhouns' counsel, directly supportive of Yamaha's position.

The *Miller* court recognized numerous instances in which (as argued by Yamaha herein) the applicability of state law had been preempted in the name of uniformity. The court also recognized, in the portion of the opinion cited by the Calhouns' counsel at argument and appearing at p. 987, that the requirement of uniformity is not absolute. After considering the competing interests involved, the court held:

> Wherever the boundaries of permissible state regulations may lie, they do not invalidate state rejection of *forum non conveniens*, which is in two respects quite dissimilar from any other matter that our opinions have held to be governed by federal admiralty law: it is procedural rather than substantive, and it is most unlikely to produce uniform results.
>
> As to the former point: At bottom, the doctrine of *forum non conveniens* is nothing more or less than a supervening venue provision . . . But venue is a matter that goes to process rather than substantive rights – determining which among various competent courts will decide the case.
>
> Uniformity of process (beyond the rudimentary elements or procedural fairness) is assuredly not what the law of admiralty seeks to achieve, since it is supposed to apply in all courts of the world.

American Dredging at 988.

This statement goes to the heart of Yamaha's position, that maritime jurisprudence envisions each and every party who brings an action for wrongful death within maritime jurisdiction receiving the same substantive remedy. Regardless of whether the decedent is a civilian or a seaman, or whether the death occurred within the territorial waters or on the high seas, each petitioner should be in a position to seek the same redress from the courts. *Forum non conveniens* is not a factor which affects the uniformity of federal maritime law for the simple reason that whichever court ultimately is chosen to hear the case must apply the same law. While state

and federal courts have concurrent jurisdiction over maritime cases, " . . . the extent to which state law may be used to remedy maritime injuries is constrained by a so-called 'reverse-Erie doctrine' which requires that the substantive remedies afforded by states conform to governing federal maritime standards," *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 223, 106 S.Ct. 2485, 2494 (1986) (*citations omitted*). The doctrine of *forum non conveniens* does not change the applicable law; it merely changes the location of the court which will apply it.

In conflicts between state and federal law involving substantive rather than procedural issues, the *American Dredging* court recognized that federal law is invariably preemptive. For example, in *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 74 S.Ct. 202 (1953), the Supreme Court held that Pennsylvania courts must apply the admiralty rule that contributory negligence was no bar to recovery, rather than the Pennsylvania rule recognizing such a defense; *Garrett v. Moore-McCormick Co.*, 317 U.S. 239, 63 S.Ct. 246 (1942), applied the federal admiralty standard of burden of proof to the question of the validity of a release; and in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917) (the case upon whose rationale *American Dredging* was based), the Supreme Court disallowed application of state workers' compensation statutes to injuries covered by the admiralty jurisdiction. *Jensen* is clearly similar to the instant case – the Supreme Court prohibited a state statutory remedy in conflict with a remedy afforded by federal maritime law.

It would be difficult to find an area of law more substantive than the question of damages to be afforded an injured plaintiff. Whether a given court should afford

a plaintiff a uniform maritime remedy or permit the utilization of the widely varied state statutes certainly cannot be described as "procedural." These are substantive rights which, under the Supreme Court analysis in *American Dredging*, clearly fall within an area where it is necessary to maintain the proper "harmony and uniformity" of maritime law. In fact, the Court again refers to *The Lottawanna*, (21 Wall.) 558, 575, 22 L.Ed. 654 (1875), where Justice Bradley said of the Article III provision extending federal judicial power "to all Cases of admiralty and maritime Jurisdiction":

> One thing . . . is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states.

This is the precise language recognized by the Supreme Court in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772 (1970), as justification for its adoption of a general maritime wrongful death action to avoid the ongoing confusion and disparities which continued to arise from application of the federal maritime statutes on the one hand and the wrongful death and survival statutes of the several states on the other.

The *American Dredging* opinion does contain the following quote, read by the Calhouns' counsel at oral argument:

> State remedies for wrongful death and state statutes providing for the survival of actions . . . have been upheld when applied to maritime causes of action. . . .

American Dredging, 114 S.Ct. at 987. However, this quote is taken directly from *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373-374, 79 S.Ct. 468, 480-481, 3 L.Ed.2d 368 (1959), a case which predates *Moragne* by some 11 years and was therefore decided at a time when there was no conflicting federal law to preempt state law. As the *American Dredging* court further noted:

> What we have concluded from our analysis of admiralty law in general is strongly confirmed by examination of federal legislation. While there is an established and continuing tradition of federal common lawmaking in admiralty, that law is to be developed, insofar as possible, to harmonize with the enactments of Congress in the field.

American Dredging, 114 S.Ct. at 989.

The Supreme Court has already ruled that damages for loss of society are not available to the survivors of a civilian proceeding under the Death on the High Seas Act, *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 98 S.Ct. 2010 (1977), or a Jones Act seaman, *Miles v. Apex Marine*, 498 U.S. 19, 111 S.Ct. 317 (1990). The *Miles* court also precluded recovery of lost future wages in a general maritime survival action. As the court notes in *American Dredging*, above, the uniformity which has been the touchstone of the emerging trend of maritime jurisprudence can only be fostered if the common law is developed in harmony with the enactments of Congress in the

field. Yamaha Motor Corporation, U.S.A. and Yamaha Motor Company, Ltd. therefore respectfully request this court to follow the lead of the Second Circuit in *Wahlstrom v. Kawasaki Heavy Industries, Ltd.*, 4 F.3d 1084 (1993), *cert. den.*, 114 S.Ct. 1060 (1994), reverse that portion of the lower court opinion permitting damages for plaintiffs' loss of society, and affirm the remainder of that decision.

Respectfully submitted,

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER

/s/ Jonathan Dryer
Jonathan Dryer
William R. Hoffman

JD/WRH/lmh

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[Rest Of Letterhead Omitted In Printing]

April 20, 1994

Via Hand Delivery

P. Douglas Sisk, Clerk
United States Court of Appeals
for the Third Circuit
U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Re: Calhoun, et al. v. Yamaha Motor Corp., U.S.A., et al.
Nos. 93-1736/1737

Dear Mr. Sisk:

As directed by the Court during oral argument on Wednesday, April 13, 1994, plaintiffs are providing, for filing and circulation to the Court, an original and three copies of this letter-brief discussing the significance of *American Dredging Company v. Miller,* 510 U.S. ___, 114 S. Ct. 981, 127 L. Ed. 2d 285, which was decided by the

United States Supreme Court on February 23, 1994. That case, and particularly the discussion at 127 L. Ed. 2d 296 and in Justice Stevens' concurring opinion at L. Ed. 2d 300-303, directly supports the Calhouns' arguments regarding federalism and admiralty and admiralty's implementation of specific state statutes as discussed in the Calhouns' Main Brief at pages 18-23 and in the Calhouns' Reply Brief at pages 3-12.

In *American Dredging,* the Supreme Court held that federal admiralty law does *not* preempt the application of a Louisiana state statute that expressly renders the federal doctrine of *forum non conveniens* inapplicable in Jones Act and federal admiralty cases.

In discussing the concept of "uniformity in admiralty" which Yamaha has advanced in the instant case as an absolute and inflexible doctrine that precludes admiralty's implementation of state statutes, the Supreme Court stated in *American Dredging* as follows:

> The requirement of uniformity is not, however, absolute. As *Jensen* itself recognized: '[I]t would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified or affected by state legislation. That this may be done to some extent cannot be denied' . . . A later case describes to what breadth this 'some extent' extends:
>
> It is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system[,] [b]ut this limitation still leaves the States a wide scope. State-created liens are enforced in admiralty. State remedies for wrongful death and

> state statutes providing for the survival of actions . . . have been upheld when applied to maritime causes of action. . . . State rules for the partition and sale of ships, state laws governing the specific performance of arbitration agreements, state laws regulating the effect of a breach of warranty under contracts of maritime insurance – all these laws and others have been accepted as rules of decision in admiralty cases even, at times, when they conflicted with a rule of maritime law which did not require uniformity. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373-374, 3 L. Ed. 2d 368, 79 S. Ct. 468 (1959) (footnotes omitted).

127 L. Ed. 2d at 296.

Thus, as recently as February 23, 1994, the Supreme Court has acknowledged and approved two of the major admiralty concepts asserted by the Calhouns in the instant case. The first is that the concept of uniformity in admiralty is *not* absolute and inflexible and that state laws *may* be given effect within admiralty jurisdiction. The second concept is that "state remedies for wrongful death and, state statutes providing for survival of actions have been upheld when applied to maritime causes of action" and have long been recognized by the Supreme Court as not abrogating any uniformity requirement of admiralty. *See e.g. Western Fuel Co. v. Garcia*, 257 U.S. 233, at 242, 42 Sup. Ct. 89, 66 L. Ed. 210 at 214 (1921) ("As the logical result of prior decisions we think it follows that where death upon such waters follows from a maritime tort committed on navigable waters within a state whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel in

personam for the damages sustained by those to whom such right is given. The subject is maritime and local in character, and the specified modification of or supplement to the rule applied in admiralty courts when following the common law will *not* work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations." (emphasis added)); *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 125, 44 S. Ct. 274, 68 L. Ed. 582, 587 (1924), (state statutes "giving the substantive right to recover for negligence resulting in death were upheld, [in admiralty] because they merely supplemented the substantive maritime law, and did not conflict with any essential feature of it."); *Just v. Chambers*, 312 U.S. 383, 387, 61 S. Ct. 687, 691 85 L. Ed. 2d 903, 907 (1941), ("it is not a principle of our maritime law that a court of admiralty must invariably refuse to recognize and enforce a liability which the State has established in dealing with a maritime subject"); *The Tungus*, 358 U.S. 588, 594, 79 S. Ct. 503, 507 3 L. Ed. 2d 524, 529 (1959) ("there is no merit to the contention that application of state law to determine rights arising from death in state territorial waters is destructive of the uniformity of federal maritime law. Even *Southern P. Co. v. Jensen*, which fathered the 'uniformity' concept, recognized that uniformity is not offended by the right given to recover in death cases.")

In *Romero v. International Terminal Operating Co.*, cited by the Supreme Court in *American Dredging*, in discussing the interaction of state and federal law in admiralty the Supreme Court stated: "although the corpus of admiralty

law is federal in the sense that it derives from the implications of Article 3 evolved by the courts, to claim that all enforced rights pertaining to matters maritime are rooted in federal law is a destructive oversimplification of the highly intricate interplay of the States and the National Government in their regulation of maritime commerce."[1] 358 U.S. 354, 382, 79 S. Ct. 468 at 480, 3 L. Ed. 2d 368, 382.

Plaintiffs respectfully submit that the foregoing Supreme Court cases and the statements of the Supreme Court in *American Dredging* regarding the interaction between state and federal law control the issue before this Court regarding the determination of the extent of damages that the Calhouns may seek to recover for the death of their daughter.

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[1] Contrary to the assertions of Yamaha's counsel during oral argument, just because a case is determined to be within admiralty jurisdiction does not mean that all state interests, statutes and laws are automatically preempted. The Supreme Court cases relied upon by Yamaha at oral argument, *Foremost*, *Sisson* and *Dau Van Tran* are all cases that deal exclusively with the issue of the extent of admiralty jurisdiction. None of those Supreme Court decisions considered the issue of what damages may be sought in a case that is determined to be within admiralty's jurisdiction. Also, it should be noted that although Judge Pollak determined that the instant case was within admiralty's jurisdiction plaintiffs have not conceded the correctness of that jurisdictional determination and retain their right to have it reviewed on appeal.

Yamaha may attempt to discount the significance of *American Dredging* by arguing that damages are substantive and not a procedural device as the doctrine of *forum non conveniens* was determined to be in *American Dredging*. Plaintiffs submit that even if damages are correctly characterized as substantive, the undisputed fact is that uniformity of damages in actions involving nonseamen and arising from deaths on state territorial waters is not now and has never been a "characteristic feature of admiralty law". 127 L. Ed. 2d at 293.

Applying the same analysis utilized by the Supreme Court in *American Dredging*, the issue in the instant case may be stated as follows: whether uniform wrongful death and survival damages in actions involving nonseamen and arising from deaths within state territorial waters are either a "characteristic feature" of admiralty or a doctrine whose uniform application is necessary to maintain the proper harmony of maritime law. 127 L. Ed. 2d at 293.

As discussed in many of the Supreme Court cases cited above, wrongful death and survival actions and damages for such actions were never considered to be a characteristic feature of admiralty. That is why admiralty courts in the United States have, almost from their inception, "implemented", "borrowed", "absorbed" or "incorporated" into admiralty the wrongful death and survival statutes available in the relevant coastal states.

The concept of implementing state law and absorbing it into admiralty to provide damages was expressly approved by the Supreme Court in *Moragne*. Clearly, the

Supreme Court was not concerned in *Moragne* with establishing "uniformity of damages". On the contrary, the Court referred to "the Death on the High Seas Act and the numerous state wrongful death acts [which] have been implemented [in admiralty] with success for decades." At 26 L. Ed. 2d 339 at 361.[2]

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[2] Contrary to the assertions of Yamaha's counsel at oral argument, the Supreme Court did not state in *Moragne* that "DOHSA was to be the "primary model" in determining what damages could be recovered in a *Moragne* wrongful death cause of action. Indeed, the Supreme Court has stated that "the liability schemes incorporated in DOHSA and the Jones Act should not be accorded overwhelming analogical weight in formulating remedies under general maritime law". *American Export Lines, Inc. v. Alvez*, 446 U.S. 274 at 283, 64 L. Ed. 2d 284, at 292 100 S. Ct. 1673 (1980). In addition, contrary to the statements made by Yamaha's counsel at oral argument, the Supreme Court did not refer in *Moragne* to the "collective law" of the states or to the law of the "majority of the states." Rather, the Court referred to "the numerous state wrongful-death acts" [which] "have been implemented [in admiralty] with success for decades". That statement was a clear reference to cases like *Western Fuel, Red Cross Line, Just v. Chambers* and *The Tungus* which allowed the implementation of state statutes within admiralty's jurisdiction. Thus, even if this Court were to determine that the Calhouns' wrongful death and survival actions are general federal maritime wrongful death and survival actions, and that plaintiffs' substantive rights to recover for negligence and products liability are premised upon general federal admiralty law, the damages recoverable in such actions are those provided in specific relevant state damages statutes and *not* those set forth in the DOHSA or the Jones Act. Plaintiffs' position is that with regard to *damages* in wrongful death and survival actions whether a commercial ship hits a jet ski or vice a versa, if the incident occurs within state territorial waters and the person killed is not a seaman, admiralty law allows the implementation of relevant state damages statutes. That is so regardless of

Just as the Supreme Court determined in *American Dredging* that "there is no basis for regarding *forum non conveniens* as a doctrine that originated in admiralty" 127 L. Ed. 2d at 295 there is similarly no basis for concluding that wrongful death and survival actions, or the damages for such actions, originated in admiralty. On the contrary, the Supreme Court's discussion in *Moragne* makes clear that until *Moragne*, absent an applicable state statute, the Jones Act or DOHSA there was no wrongful death action in admiralty.[3] *Moragne* 26 L. Ed. 2d 352-358. Thus, it

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whether it is determined that the wrongful death and survival *right of action* is premised upon general federal admiralty law or upon the state statutes themselves. Under longstanding federalism principles in admiralty as well as under the doctrine of depecage, different issues (*e.g.*, liability vs. damages) arising out of a single set of facts may be decided pursuant to the law of different jurisdictions. *Broome v. Antlers' Hunting Club*, 595 F.2d 921, 723 N.5 (3rd Cir. 1979). Thus in the instant case, liability issues may be determined by federal admiralty substantive law and the damages issues may be determined in admiralty by implementing state law.

[3] Plaintiffs' position is that the wrongful death cause of action fashioned by the Supreme Court in *Moragne* is limited to wrongful death causes of action based upon the warranty of seaworthiness and is thus limited to seamen. As discussed more fully in plaintiffs' Main Brief pp. 8-17 and Reply Brief pp. 3-9, support for plaintiffs' interpretation of the limited nature of the *Moragne* decision is found in numerous decisions. The limited holding of *Moragne* was also re-affirmed by the Supreme Court in *Miles*. There the Supreme Court stated: "If there has been any doubt about the matter, we today make explicit that there is a general maritime cause of action for the wrongful death of a seaman, adopting the reasoning of the unanimous and carefully crafted opinion in *Moragne*. 112 L. Ed. 2d 275 at 289. Because the Supreme Court has expressly limited the general maritime wrongful death cause of action to the wrongful death of a

cannot reasonably be concluded that wrongful death actions or damages for maritime deaths "originated in admiralty". Also, like the doctrine of *forum non conveniens* discussed in *American Dredging*, the doctrine of awarding damages in wrongful death and survival actions neither originated in admiralty nor has exclusive application there. On the contrary, like *forum non conveniens*, awarding damages in wrongful death and survival actions has long been a doctrine of general application. Thus, a decision by this Court to allow the Calhouns to seek to recover the damages provided by the law of Pennsylvania, in a case involving the death of a Pennsylvania resident within state territorial waters, will not in any way "work material prejudice to [a] characteristic feature of the general maritime law". There is no characteristic feature of the general maritime law that precludes implementing particular state damages statutes in a case involving the death of a nonseaman in state territorial waters.

That specific state laws may be given effect in admiralty matters and may affect or impair commerce has been accepted in admiralty for many years. As noted by Justice Stevens in his concurring opinion in *American Dredging* in discussing the concept of admiralty uniformity and *forum non conveniens:*

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seaman, *Moragne* did not take away any pre-*Moragne* rights, remedies and damages for maritime wrongful deaths. Thus, it remains permissible in admiralty to implement specific state wrongful death and survival statutes.

> [e]qually significant is the fact that Congress, which has unquestioned power to decree uniformity in maritime matters, has declined to set forth a federal forum convenience standard for admiralty cases.
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> * * *
>
> When relevant federal legislation indicates that Congress has opted to permit state "diversity" in admiralty matters, a finding of federal preemption is inappropriate. Just as in cases involving non-maritime subjects, *see e.g., Cippolone v. Liggett Group, Inc.*, 505 U.S. ___, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992) . . . we should not lightly conclude that the federal law of the sea trumps a duly enacted state statute.

127 L. Ed. 2d 301-302.

Just as Justice Stevens noted in *American Dredging* when discussing *forum non conveniens*, plaintiffs in the instant case have pointed out what Justice Stevens characterized as the "significant" fact that Congress has declined to set forth a uniform damages standard for admiralty cases arising from accidents within state territorial waters. Even more significant is the fact that Congress has, in a relevant federal statute, expressly stated that it has opted to permit state "diversity" in admiralty matters occurring within state territorial waters. That federal statute is the DOHSA. There, Congress, as repeatedly acknowledged by the Supreme Court, has expressly stated that the operation of state death statutes are to be protected in actions involving deaths occurring within state territorial waters.

For example, in *Romero*, the Supreme Court expressly acknowledged that "Congress was careful to make the Death on the High Seas Act applicable only outside state territorial waters so as not to intrude on state legislative competence." *Romero* at 358 U.S. 374 N. 42, 79 S. Ct. 468 at 481 N. 42, 3 L. Ed. 2d at 383 N. 42. (Note 42 also contains a detailed discussion of why state statutes may be implemented within admiralty jurisdiction.)

Similarly, in *The Tungus*, the Supreme Court expressly acknowledged that "the legislative history of the Death on the High Seas Act discloses a clear congressional purpose to leave 'unimpaired the rights under State statutes as to . . . deaths on waters within the territorial jurisdiction of the states. The record of the debate in the House of Representatives preceding passage of the bill reflects deep concern that the power of the States to create actions for wrongful death in no way be affected by enactment of the federal law." 358 U.S. at 593 79 S. Ct. at 587 3 L. Ed. 2d at 529.

In *Moragne*, in discussing the legislative history of the DOHSA, the Supreme Court quoted from the legislative history and expressly recognized that the concern of Congress in passing DOHSA was that a right of action for death on the high seas be created "leaving unimpaired the rights under state statutes as to deaths on waters within the territorial jurisdiction of the states" and that "the power of the states to create actions for wrongful death in no way be affected". *Moragne* 26 L. Ed. 2d at 355.

In *Gaudet* 39 L. Ed. 2d 9 at 23, N.22, the Supreme Court noted that "Congress' insistence that the Act not extend to territorial waters, indicates that Congress was

not concerned that there be a uniform measure of damages for wrongful deaths occurring within admiralty jurisdiction, for in many instances state wrongful-death statutes extending to territorial waters provided a more liberal measure of damages than the Death on the High Seas Act."

Similarly in *Tallentire*, 477 U.S. 207, 227, 91 L. Ed. 2d 174, 192, 106 S. Ct. 2485, the Supreme Court examined the legislative history of the DOHSA and concluded that DOHSA expressly sanctioned "the operation of state wrongful death statutes . . . in territorial waters".[4]

Thus, consistent with the federalism analysis articulated by the Supreme Court in the cases discussed above and in *American Dredging*, this Court should acknowledge and respect the will of Congress as expressed in the DOHSA and continue to permit the implementation of relevant state damages statutes in an admiralty matter involving the death of a nonseaman occurring within state territorial waters.

Plaintiffs submit that the primary motivating federal interest in admiralty is the protection of seamen. Thus, as long as seamen and their families are uniformly protected

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[4] Contrary to the statements of Yamaha's counsel at oral argument, *Tallentire* and *Dugas* are not the same case and *Tallentire* does not undercut *Dugas* at all. *Tallentire* held only that a state wrongful death statute could not be applied to a DOHSA wrongful death claim. *Dugas* did not involve the application of a state wrongful death statute on the high seas. *Dugas* involved the application of a state survival statute in conjunction with a DOHSA claim. There was no preemption problem in *Dugas* because DOHSA is not a survival claim statute.

and guaranteed their federal remedies against state impairment there is no basis to hold that the application of state damages statutes are preempted and may not be utilized in actions involving the deaths of non-seamen in state territorial waters. As noted by the Supreme Court in *American Dredging*, there are numerous instances when state laws are given effect in admiralty. 127 L. Ed. 2d 296. Accordingly, those who avail themselves of business in maritime commerce will frequently be subjected to the rights and interests of the various states in whose waters they choose to travel and trade. Yamaha markets its products in all 50 states and all over the world and thereby voluntarily subjects itself to a myriad of different laws, duties and damages. Thus, Yamaha does not rely upon the damages law of any one particular jurisdiction in planning its business.

Moreover, there is no reason why a federal interest in protecting interstate maritime commerce should be given more weight than the federal interest in protecting interstate commerce on federally funded, regulated and controlled interstate highways, railways or airways. There is no justification on public policy or commerce grounds to conclude that there must be uniformity of damages for deaths occurring in state territorial waters when there is no such requirement or interest in uniformity of damages for deaths occurring on interstate highways or railways or concerning deaths resulting from interstate aviation.

Indeed, of the four types of cases and commerce – admiralty, interstate highway, interstate railway, and interstate aviation – only admiralty has enunciated a principle wherein the Supreme Court has characterized admiralty proceedings as "humane and liberal" and has

held that a death remedy should be provided "when not required to be withheld by established and inflexible rules." That principle has been traced to an early admiralty case, *The Sea Gull*, 21 F. Cas. 909 (No. 12, 578)) (CC Md. 1865). That principle has been acknowledged by many courts including the Supreme Court in *Moragne*, 26 L. Ed. 2d 339 at 349 and this Court in *Dugas*, 438 F.2d 1386 at 1391 N. 8. That long established admiralty principle must be considered in any analysis of federal and state interests. That principle supports plaintiffs' position that this Court should not, as Yamaha requests, severely limit the damages the Calhouns may seek, thereby denying the Calhouns any effective remedy in admiralty for the death of their daughter within state territorial waters.[5]

In discussing the issue of what impact state law may have on commerce in admiralty the Supreme Court stated in *American Dredging*, "whatever might be the unifying theme of this aspect of our admiralty jurisprudence, it assuredly is *not* what the dissent takes it to be, namely, the principle that the states may not impair maritime commerce". 127 L. Ed. 2d at 296 N. 3.

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[5] Had Natalie Calhoun been seriously injured in the subject accident rather than killed, there is no doubt that the general federal admiralty law regarding personal injury actions would have provided her with complete damages including loss of income, punitive damages, medical expenses and pain and suffering. Davis, *Maritime Law Deskbook*, § V.B. 1 and 2, *Personal Injuries to Seamen, Passengers and Invitees* (1989). There is absolutely no rational basis to conclude that because her injuries were serious enough to cause death that admiralty law does not allow any significant damages.

In his concurring opinion, Justice Stevens goes even farther:

> While I do not propose that we abandon commerce as a guiding concern, we should recognize that, today, the federal interest in free trade and uniformity are amply protected by other means. Most importantly, we now recognize Congress' broad authority under the Commerce Clause to supplant state law with uniform federal statutes. Moreover, state laws that affect maritime commerce, interstate and foreign, are subject to judicial scrutiny under the Commerce Clause. And to the extent that the mere assertion of state judicial power may threaten maritime commerce, the Due Process Clause provides an important measure of protection for out-of-state defendants, especially foreigners.

127 L. Ed. 2d at 302. Thus, because Congress has elected not to supplant state laws with a federal statute establishing uniform liabilities and uniform damages for deaths within state territorial waters, this Court should not attempt to effect the same result in the name of the vague and criticized concept of uniformity in admiralty.

In *American Dredging*, the Supreme Court has expressly sanctioned the federal-state interest analysis advocated by plaintiffs in the instant case. That analysis leads to the conclusion that this Court may properly implement in admiralty the wrongful death and survival damages of the Commonwealth of Pennsylvania in this

case which arises from the death of a 12 year old Pennsylvania resident who died as a result of riding a Yamaha recreational vehicle in state territorial waters.

Respectfully submitted,

/s/ Thomas A. Masterson, Jr.
Thomas A. Masterson, Jr.

TAM JR:loc

cc: Jonathan Dryer, Esquire

SUPREME COURT OF THE UNITED STATES

No. 94-1387

Yamaha Motor Corporation, U.S.A., et al.,

Petitioners

v.

Lucien B. Calhoun, etc., et al.,

ORDER ALLOWING CERTIORARI. Filed May 22, 1995.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted limited to question 1 presented by the petition. In addition to question 1 presented by the petition, the parties are requested to brief and argue the following question: "Under 28 U.S.C. Section 1292(b), can the Courts of Appeals exercise jurisdiction over any question that is included within the order that contains the controlling question of law identified by the District Court?"

May 22, 1995

(5)

No. 94-1387

Supreme Court, U.S.
FILED
JUL 26 1995
CLERK

In The

Supreme Court of the United States

October Term, 1995

YAMAHA MOTOR CORPORATION, U.S.A. and
YAMAHA MOTOR COMPANY, LTD.,

Petitioners,

v.

LUCIEN B. CALHOUN and ROBIN L. CALHOUN,
Individually and as Administrators of the
Estate of Natalie K. Calhoun, Deceased,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Third Circuit incorrectly decide that the damages, if any, available to survivors of the victim of a fatal recreational boating accident which occurred in navigable territorial waters are determined under state law rather than according to the general federal maritime cause of action created by this Court in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970)?

2. Under 28 U.S.C. § 1292(b), can the Courts of Appeals exercise jurisdiction over any question that is included within the order that contains the controlling question of law identified by the District Court?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners/Defendants Below

Yamaha Motor Corporation, U.S.A. ("YMUS") was incorporated in California in 1976. Its principal place of business is 6555 Katella Avenue, Cypress, CA 90630. YMUS markets and distributes Yamaha motorized products including motorcycles, snowmobiles, generators, scooters, all-terrain vehicles, personal watercraft, outboard motors and golf cars.

Yamaha Motor Company, Ltd. ("YMC") was incorporated in Japan in 1955. Its principal place of business is 2500 Shingai, Iwata-Shi, Shizuoka-Ken, Japan. YMC manufactures motorcycles, all-terrain vehicles, boats, personal watercraft, snowmobiles, go-karts, generators and golf cars. YMC owns 100% of the stock of YMUS.

Respondents/Plaintiffs Below

Respondents, Lucien B. Calhoun and Robin L. Calhoun, both residents of the Commonwealth of Pennsylvania, are the parents of Natalie K. Calhoun, deceased, and are also the administrators of her estate.

Other Parties/Defendants Below

Palmas Del Mar Company; Palmas Del Mar, Inc.; Palmas Yacht Club, Inc.; Maxxam Properties, Inc.; ABC Corporation; XYZ Partnership(s); Candelero Hotel Corporation; and Marina De Palmas Shipyard, Inc. were named as defendants in the suit below. However, these parties

PARTIES TO THE PROCEEDINGS BELOW – Continued

were dismissed without prejudice from this action by stipulation approved by the district court below on February 12, 1991. Pet. App. 86a.

Rule 29.1 Statement

YAMAHA CORPORATION

Subsidiaries and Affiliates

- Yamaha Motor Company, Ltd.
- Yamaha Motor Corporation, U.S.A.
- Yamaha Motor Manufacturing Corporation of America (incorporated in the State of Georgia)

While there are other Yamaha subsidiaries and affiliates, they are either wholly-owned and/or not publicly traded.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW ii

Petitioners/Defendants Below ii

Respondents/Plaintiffs Below ii

Other Parties/Defendants Below ii

Rule 29.1 Statement iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED 3

STATEMENT OF THE CASE 3

I. Factual Background 3

II. Proceedings Below 5

SUMMARY OF ARGUMENT 8

ARGUMENT 10

I. THIS COURT INTENDED FOR *MORAGNE* TO PROVIDE THE EXCLUSIVE REMEDY FOR MARITIME WRONGFUL DEATHS NOT COVERED BY FEDERAL STATUTE 10

A. Substantive Maritime Law Governs Recreational Boating Accidents In Territorial Waters 11

TABLE OF CONTENTS – Continued

Page

B. *Moragne* And Its Progeny Provide The Substantive Law Applicable To All Deaths On Territorial Waters 17

1. Pre-*Moragne* – Statutory Maritime Remedies 17

2. *Moragne* – Filling The Gap 21

3. Post-*Moragne* – Sealing The Cracks 22

C. The Decision Of The Court Of Appeals Is Not In Accordance With Maritime Law 28

1. There Is No Split Of Authority: *Moragne* Displaces State Wrongful Death Statutes .. 28

2. The Decision Of The Court Of Appeals Misapprehends *Tallentire* And *Moragne* 32

3. The Decision Of The Court Of Appeals Undermines Uniformity 39

II. THE COURT OF APPEALS HAD AUTHORITY, PURSUANT TO 28 U.S.C. § 1292(b), TO EXERCISE JURISDICTION OVER ANY QUESTION INCLUDED WITHIN THE CERTIFIED ORDER ... 43

CONCLUSION 50

TABLE OF AUTHORITIES

Page

CASES

American Dredging Co. v. Miller, 510 U.S. ___, 114 S. Ct. 981 (1994) 14-17

Anderson v. Whittaker Corp., 692 F. Supp. 764 (W.D. Mich. 1988), *aff'd in part, rev'd in part on other grounds*, 894 F.2d 804 (CA6 1990) 26

Barbe v. Drummond, 507 F.2d 794 (CA1 1974) 26

Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971) 45-47

Calhoun v. Yamaha Motor Corp., U.S.A., No. Civ. A. 90-4295, 1993 WL 216238 (E.D. Pa., June 22, 1993) 1, 2, 10

Calhoun v. Yamaha Motor Corp., U.S.A., 40 F.3d 622 (CA3 1994) ..... *passim*

Cantore v. Blue Lagoon Water Sports, Inc., 799 F. Supp. 1151 (S.D. Fla. 1992) 27

Caraballo v. Autoridad de Los Puertos de Puerto Rico, 388 F. Supp. 308 (D.P.R. 1974) 4

Carey v. Bahama Cruise Lines, 864 F.2d 201 (CA1 1988) 30

Chicago, R.I. & P.R. Co. v. Stude, 346 U.S. 574 (1954) 45

Choat v. Kawasaki Motors Corp., No. 1920544, 1994 WL 221417 (Ala., May 27, 1994) 27

Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) 47

Dailey v. National Hockey League, 987 F.2d 172 (CA3 1993) 44-45, 49

TABLE OF AUTHORITIES – Continued

Page

Deckert v. Independence Shares Corp., 311 U.S. 282 (1940) 45

East River S.S. Corp. v. Transamerica Delaval, 476 U.S. 858 (1986) 13

Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) 45

Ellenwood v. Exxon Shipping Co., 984 F.2d 1270 (CA1), *cert. denied*, 508 U.S. ___, 113 S. Ct. 2987 (1993) 28-29

Estate of Fajardo v. Maersk Line Agency, Inc., No. Civ. A. R-88-274, 1988 WL 168532 (D. Md., Nov. 30, 1988) 28

Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972) 11, 13

Favorito v. Pannell, 27 F.3d 716 (CA1 1994) 30

Foremost Insurance Co. v. Richardson, 457 U.S. 668 (1982) 11, 13, 14, 24

Foremost Insurance Co. v. Richardson, 641 F.2d 314 (CA5 1981) 14

Frantz v. Brunswick Corp., 866 F. Supp. 527 (S.D. Ala. 1994) 27

Gilmore v. Witschorek, 411 F. Supp. 491 (E.D. Ill. 1976) 27

Greene v. Vantage S.S. Corp., 466 F.2d 159 (CA4 1972) 26

In re Cinematronics, 916 F.2d 1444 (CA9 1990).....44, 49

Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. ___, 115 S. Ct. 1043 (1995).....12, 13

Kelly v. Panama Canal Comm'n, 26 F.3d 597 (CA5 1994) 26

TABLE OF AUTHORITIES – Continued

Page

Lipworth v. Kawasaki Motors Corp., U.S.A., 592 So. 2d 1151 (Fla. Dist. Ct. App.), *cert. denied*, 506 U.S. ___, 113 S.Ct. 465 (1992) 27

Lyon v. Ranger III, 858 F.2d 22 (CA1 1988)..... 30

Marine Transp. Serv. Sea-Barge Group, Inc. v. Python High Performance Marine Corp., 16 F.3d 1133 (CA11 1994)..... 31

Medina v. Perez, 733 F.2d 170 (CA P.R.), *cert. denied*, 469 U.S. 1106 (1984)..... 30

Miles v. Apex Marine Corp., 498 U.S. 19 (1990)... *passim*

Miller v. American President Lines, Ltd., 989 F.2d 1450 (CA6 1993)..... 41-42

Mink v. Genmar Indus., Inc., 29 F.3d 1543 (CA11 1994)..... 26

Mitchell v. Forsyth, 472 U.S. 511 (1985) 47

Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978)..... *passim*

Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970)..... *passim*

Newhouse v. United States, 844 F. Supp. 1389 (D. Nev. 1994)..... 27

Off-Shore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986)..... *passim*

Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953) 13

Preston v. Frantz, 11 F.3d 357 (CA2 1993), *cert. dismissed*, 513 U.S. ___, 115 S. Ct. 31 (1994) 13

TABLE OF AUTHORITIES – Continued

Page

Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 (1974) ..... *passim*

Sisson v. Ruby, 497 U.S. 358 (1990) 12-13, 24

Sistrunk v. Circle Bar Drilling Co., 770 F.2d 455 (CA5 1985), *cert. denied*, 475 U.S. 1019 (1986)..... 41

Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917).....18-19

Spiller v. Thomas M. Lowe, Jr. & Assocs., Inc., 466 F.2d 903 (CA8 1972) 26

St. Hilaire Moye v. Henderson, 496 F.2d 973 (CA8), *cert. denied*, 419 U.S. 884 (1974) 26

Sutton v. Earles, 26 F.3d 903 (CA9 1994)..... 26-27

Swint v. Chambers County Comm'n, 514 U.S. ___, 115 S. Ct. 1203 (1995) 13, 45, 47-49

Texaco Refining & Marketing, Inc. v. Estate of Dau Van Tran, 777 S.W.2d 783 (Tex. Ct. App. 1989), *vacated*, 497 U.S. 1020, *on remand*, 795 S.W.2d 870 (Tex. Ct. App. 1990), *rev'd*, 808 S.W.2d 61 (Tex.), *cert. denied*, 502 U.S. 908 (1991) 23-24, 28, 37

The Hamilton, 207 U.S. 398 (1907) 18

The Harrisburg, 199 U.S. 199 (1886)..... *passim*

The Lottawanna, 21 Wall. (88 U.S.) 558 (1875) 31

The Plymouth, 3 Wall. (70 U.S.) 20 (1866) 11

The Tungus v. Skovgaard, 358 U.S. 588 (1959)..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) 45

Truehart v. Blandon, 672 F. Supp. 929 (E.D. La. 1987) 28, 31

United States v. Stanley, 483 U.S. 669 (1987) ... 43, 45, 47

Wahlstrom v. Kawasaki Heavy Indus., Ltd., 4 F.3d 1084 (CA2 1993), *cert. denied*, 510 U.S. ___, 114 S. Ct. 1060 (1994) 24-25

Walker v. Braus, 995 F.2d 77 (CA5 1993) 26

CONSTITUTIONAL PROVISION

U.S. Const. art. III, § 2 ..... 3, 24

STATUTES AND REGULATIONS

Fed. R. App. P. 5(a) 7

42 Pa. Cons. Stat. Ann. § 8301 (1982 & Supp. 1994) 4

42 Pa. Cons. Stat. Ann. § 8302 (1982 & Supp. 1994) 4

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1292 ..... *passim*

28 U.S.C. § 1332 4

28 U.S.C. § 1333 ..... 3, 4, 33

33 U.S.C. § 901, *et seq.* 20

33 U.S.C. § 905(b) 20

45 U.S.C. § 51 20

45 U.S.C. § 1, *et seq.* 20

TABLE OF AUTHORITIES – Continued

Page

46 U.S.C. § 688 ..... 17, 20

46 U.S.C. § 761, *et seq.* 19-20

46 U.S.C. § 763a 27

46 U.S.C. § 767 32-34

48 U.S.C. § 749 3

33 C.F.R., Ch. 1, § 2.05-5(a) (1988) 3

OTHER AUTHORITIES

T. Schoenbaum, *Admiralty and Maritime Law* § 8-3 (2d ed. 1994) 28-29

14 Wright, Miller & Cooper, *Federal Practice & Procedure* § 3672 (Supp. 1994) 36-37

16 Wright, Miller & Cooper, *Federal Practice & Procedure* § 3929 (1977) 44, 46

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For The Third Circuit

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The memorandum opinion and orders of the district court below (Pet. App. 51a) are reported at No. Civ. A. 90-4295, 1993 WL 216238 (E.D. Pa., June 22, 1993).[1] The

[1] The district court opinion originally recited from the bench on December 24, 1992 was not formally issued by the court in written form until June 17, 1993.

combined order denying Yamaha's motion for reconsideration and certifying the issue for immediate interlocutory appeal (Pet. App. 73a) is reported at No. Civ. A. 90-4295, 1993 WL 197319 (E.D. Pa., June 2, 1993). The district court's order amending certification to include plaintiffs' questions (Pet. App. 78a) is reported at No. Civ. A. 90-4295, 1993 WL 218833 (E.D. Pa., June 21, 1993). The court of appeals' orders granting permission for interlocutory appeal pursuant to Fed. R. App. P. 5(a) and consolidating the appeals are not reported, but were included in the Certiorari Petition's appendix at 84a. The opinion and judgment of the court of appeals (Pet. App. 1a and 44a), as amended (Pet. App. 47a), are reported at 40 F.3d 622 (CA3 1994). The court of appeals' order upon denial of a petition for rehearing with suggestion for rehearing in banc (Pet. App. 49a) is reported at 40 F.3d 622, 645 (CA3 1994).

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1994 (Pet. App. 44a) and a timely petition for rehearing was denied on December 7, 1994. Pet. App. 49a. The petition for a writ of certiorari was filed on February 17, 1995, and was granted by Order entered on May 22, 1995. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

U.S. Const. art. III, § 2:

> The judicial power shall extend . . . to all Cases of admiralty and maritime jurisdiction. . . .

28 U.S.C. § 1333:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

STATEMENT OF THE CASE

I. Factual Background

On July 6, 1989, Natalie Calhoun, the 12-year-old daughter of respondents Lucien B. and Robin L. Calhoun, was killed when the rented personal watercraft she was operating collided with a vessel anchored in navigable territorial waters off the coast of Puerto Rico.[2] The personal watercraft was a "WaveJammer" model manufactured by Yamaha Motor Company, Ltd. and distributed

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[2] "Territorial seas," with respect to the United States, are defined as "the waters within the belt, three (3) nautical miles wide adjacent to its coast and seaward of the territorial sea baseline." 33 C.F.R., Ch. 1, § 2.05-5(a) (1988). United States maritime law will be applied to territorial waters surrounding Puerto Rico since by virtue of the Federal Relations Act, 48 U.S.C. § 749, Congress placed under the control of the Commonwealth of Puerto Rico its harbor areas and navigable bodies of

by Yamaha Motor Corporation, U.S.A. ("Yamaha"). Although they presumably incurred funeral expenses, the Calhouns have not alleged they were in any way financially dependent on their daughter.

By complaint filed on June 27, 1990 (and amended on August 10, 1990), Mr. and Mrs. Calhoun, individually and in their capacities as administrators of their daughter's estate, sued Yamaha in the United States District Court for the Eastern District of Pennsylvania[3] seeking recovery under the Pennsylvania wrongful death[4] and survival[5] statutes. Federal jurisdiction was founded on both diversity of citizenship[6] and admiralty.[7] The Calhouns have alleged theories of negligence, strict liability, and breach of implied warranties, and seek recovery for damages including lost future earnings, loss of society, loss of support and services, funeral expenses and punitive damages. Yamaha has denied these allegations by responsive pleading filed on August 17, 1990.

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water. In that same statute, it is stated that all laws of the United States for the protection and improvement of navigable waters of the United States and the preservation of navigation and commerce shall apply to Puerto Rico and its waters. *Caraballo v. Autoridad de Los Puertos de Puerto Rico*, 388 F. Supp. 308 (D.P.R. 1974).

[3] Lucien and Robin Calhoun are residents of the Commonwealth of Pennsylvania. Natalie Calhoun's estate is also being administered in Pennsylvania.

[4] 42 Pa. Cons. Stat. Ann. § 8301 (1982 & Supp. 1994).

[5] 42 Pa. Cons. Stat. Ann. § 8302 (1982 & Supp. 1994).

[6] 28 U.S.C. § 1332 (1993).

[7] 28 U.S.C. § 1333 (1993).

II. Proceedings Below

On November 27, 1991, Yamaha moved for partial summary judgment, asserting that damages recoverable, if any, were to be determined under the federal general maritime cause of action announced by this Court in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), rather than the Pennsylvania remedial statutes referenced above. Because the accident in question occurred on navigable waters and resulted from traditional maritime activity, and since the facts of this case did not bring it within the parameters of any of the maritime statutory remedies, Yamaha argued that the damages recoverable must be determined pursuant to the federal common law of admiralty. Yamaha further asserted that under general maritime law, plaintiffs were not entitled to recover lost future wages, loss of society or punitive damages. The district court held that (1) the federal common law of admiralty governed the Calhouns' wrongful death and survival claims;[8] (2) the general maritime death action, announced in *Moragne*, displaced Pennsylvania wrongful death and survival statutes;[9] and (3) under this federal maritime common law remedy, lost future wages and

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[8] *See* March 19, 1992 district court order granting summary judgment to the extent plaintiffs' claims are to be determined under the law of admiralty. Pet. App. 51a.

[9] *See* December 29, 1992 district court order and bench opinion (recited December 24, 1992 and issued by the court on June 17, 1993). Pet. App. 65a-66a.

punitive damages could not be awarded, but loss of society and loss of support and services were compensable.[10]

After rejecting Yamaha's motion for reconsideration, the district court agreed to certify the question of whether loss of society was a proper element of damages under the general maritime death action to the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. § 1292(b). Pet. App. 73a. The Calhouns then requested that the district court amend its certification order to add the questions of whether future wage loss and punitive damages were recoverable. The district court agreed and entered the amended order cited at Pet. App. 78a, the relevant portion of which reads as follows:

ORDER

> For the reasons set forth in the accompanying Memorandum:
>
> 1. The certification pursuant to 28 U.S.C. § 1292(b) contained in the order of June 3, 1993, is hereby AMENDED to read as follows:
>
> Natalie Calhoun, the minor child of plaintiffs Lucien B. Calhoun and Robin L. Calhoun, who are Pennsylvania residents, was killed in an accident not far off shore in Puerto Rico, in the territorial waters of the United States. . . . The district court has concluded that admiralty jurisdiction attaches to these several counts and that they constitute a federal maritime cause of

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[10] *See* December 29, 1992 district court order and bench opinion (recited December 24, 1992 and issued by the court on June 17, 1993). Pet. App. 67a, 71a-72a.

> action. The questions of law certified to the Court of Appeals are whether, pursuant to such a [federal] maritime cause of action, plaintiffs may seek to recover (1) damages for the loss of the society of their deceased minor child, (2) damages for the loss of their child's future earnings, and (3) punitive damages.

By order dated July 16, 1993 and pursuant to Fed. R. App. P. 5(a), the court of appeals granted permission for interlocutory appeal on these related issues. Pet. App. 84a. The appeals were consolidated, briefs submitted and oral argument took place on April 13, 1994 before Judges Becker, Mansmann and Scirica. The panel's opinion and judgment were issued on November 2, 1994. Pet. App. 1a and 44a.

The questions of law certified to the court of appeals by the district court below involved the measure of damages recoverable in a federal maritime death action. On appeal, however, the Third Circuit decided the answers to the certified questions depended upon a reexamination of the premise underlying the district court's decision, i.e., that the Calhouns' rights were to be determined under federal maritime law. Since the court of appeals concluded that the *Moragne* remedy did *not* apply to this case, the questions originally certified by the district court were never reached. Pet. App. 4a; 40 F.3d at 625. Instead, having dismissed the *Moragne* remedy, the court of appeals held there was no body of federal law applicable to the death of a recreational boater in territorial waters and that state law should therefore apply. Pet. App. 4a; 40 F.3d at 625.

Accordingly, the district court order granting Yamaha partial summary judgment and precluding recovery for

lost future wages and punitive damages was reversed, and the order denying partial summary judgment on loss of society damages was affirmed. Pet. App. 4a and 43a; 40 F.3d at 625, 645. The case was remanded to the district court for further proceedings, including a preliminary determination of whether plaintiffs' claims should be governed by the law of Pennsylvania or Puerto Rico. App. 4a and 42a; 40 F.3d at 625, 644.

On February 17, 1995, Yamaha filed a petition for writ of certiorari seeking review of the Third Circuit Court of Appeals' decision that damages in a recreational boating death case on territorial waters should be determined under state statutory law rather than general federal maritime law. Yamaha also sought clarification as to the elements of damages permitted under a general maritime death action. On May 22, 1995, this Court granted the petition only with respect to the first question, but asked the parties to also brief and argue a procedural question relating to the scope of appellate jurisdiction in interlocutory appeals. (*See* Petition for Writ of Certiorari, Question Presented, No. 1, and this Court's May 22, 1995 Order Allowing Certiorari, J.A. 40.)

SUMMARY OF ARGUMENT

In the last twenty-five years, nearly every court facing the issue has worked toward the uniform nationwide body of maritime law envisioned by this Court when it decided *Moragne*. Using the federal maritime statutes as a

guide, the national jurisprudence has moved consistently toward a body of law in which all maritime claimants receive substantially identical remedies, regardless of whether the accident occurs within territorial waters or on the high seas, and regardless of whether the victim is a seaman or a civilian.[11]

Ignoring *Moragne*, the court of appeals disavowed the existence of a federal maritime remedy applicable to recreational boaters in territorial waters. Instead, the court ruled that the remedies available to the survivors of such accidents would depend on state law.

The decision of the court of appeals is unsupported by post-*Moragne* authority. It misapprehends *Moragne* and a series of later decisions of this Court and is inconsistent with decisions from the Second, Fifth, Sixth, Eighth and Ninth Circuits. The real problem with the decision, however, lies not in why it was wrongly decided but in the effect it will have if allowed to stand. Unless reversed, this decision will sound the death knell to the fundamental concept of maritime jurisdiction – its uniformity – this Court has spent decades creating.

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[11] The court of appeals used the term "recreational boater" and "non-seaman" interchangeably, even though the latter describes a broader category including, but not limited to, longshoremen, harbor workers and cruise ship passengers, in addition to recreational boaters. Petitioners have attempted to clarify this terminology by utilizing the term "civilian" to cover all "non-seaman," with further specificity depending on the factual circumstances of each case.

ARGUMENT

I. THIS COURT INTENDED FOR *MORAGNE* TO PROVIDE THE EXCLUSIVE REMEDY FOR MARITIME WRONGFUL DEATHS NOT COVERED BY FEDERAL STATUTE

In order to resolve the issue accepted for review, this Court must answer one relatively straightforward question: whether the general maritime remedy announced in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970) applies to wrongful death cases involving recreational boaters in territorial waters. The court of appeals answered this question in the negative. However, it further held that even assuming *Moragne* was in fact applicable to the *Calhoun* accident, the remedy available would still depend in large part on state law:

> The correct analytic conclusion, we believe, is that admiralty law simply has not spoken to the factual situation of this case, *see infra* at typescript 28-32, 32-39, and that state laws accordingly apply of their own force. Were we to find federal admiralty law governing wrongful death and survival actions applicable to the death of a recreational boater occurring within state territorial waters, however, our analysis would likely lead us to hold that admiralty law either does not displace or adopts (or incorporates) state (or territorial) tort law. *See infra* at n.33.

Pet. App. 10a, n.7; 40 F.3d at 628, n.7.

For the reasons which appear below, the court of appeals erred in concluding that *Moragne* does not apply to the case of a recreational boater. Moreover, that remedy is not only applicable, but exclusive.

A. Substantive Maritime Law Governs Recreational Boating Accidents In Territorial Waters

The Third Circuit's opinion is premised on the conclusion that federal maritime law does not apply to the death of a recreational boater and that there is therefore no federal law with which state law can conflict. Nevertheless, the court did not question, and could not question, that admiralty jurisdiction extends to recreational boating.

The traditional test for admiralty jurisdiction in a tort case was the locality of the wrong. A case was actionable in admiralty if the incident occurred on navigable waters. *The Plymouth*, 3 Wall. (70 U.S.) 20, 35-36 (1866). Locality remained the sole test of admiralty tort jurisdiction until 1972, when this Court issued its decision in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), wherein the Court held that admiralty jurisdiction did not extend to the case of an aircraft which had fortuitously crashed into navigable waters after encountering a flock of birds on takeoff for what was going to be an overland flight. After *Executive Jet*, location on or over navigable waters was not in and of itself sufficient to turn an aircraft negligence action into a maritime tort. Admiralty jurisdiction was held to be lacking because the accident did not bear a significant relationship to traditional maritime activity.

The criteria for admiralty jurisdiction were again refined in *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982), a wrongful death action arising from the collision of two recreational boats on navigable waters. This Court determined the cause of action to be cognizable in

admiralty because such an incident implicated the traditional maritime concern of navigation and could possibly disrupt commercial maritime activity. The Court determined that the maritime activity itself need not be commercial so long as it had the potential to impact on maritime commerce.

In *Sisson v. Ruby*, 497 U.S. 358 (1990), the Court upheld admiralty jurisdiction in an action involving a fire aboard a noncommercial vessel docked at a marina located on a navigable waterway. The Court again focused on the potential rather than actual effect on maritime commerce, finding the possible destruction of commercial facilities and/or disruption of traffic to be sufficient to establish jurisdiction.[12] The Court observed that, "[t]he need for uniform rules of maritime conduct

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[12] Justice Scalia, in a concurring opinion in which he was joined by Justice White, stated that he did not agree with the test applied by the majority and that "our clear case law extended admiralty jurisdiction to all torts involving vessels on navigable waters." 497 U.S. at 368. More recently, in his concurring opinion in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. ___, 115 S. Ct. 1043 (1995), Justice Thomas, joined by Justice Scalia, wrote:

> I would restore the jurisdictional inquiry to the simple question whether the tort occurred on a vessel on the navigable waters of the United States. If so, then admiralty jurisdiction exists. This clear, bright-line rule, which the Court applied until recently, ensures the judges and litigants will not waste their resources in determining the extent of federal subject-matter jurisdiction.

Id. at 1055-56.

and liability . . . extends at least to . . . activities traditionally undertaken by vessels, commercial or noncommercial." *Id.* at 367.

With the exercise of admiralty jurisdiction comes the application of the full body of substantive maritime law. *See, Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. ___, 115 S.Ct. 1043 (1995); *East River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858, 864 (1986), citing *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 255 (1972). *See also Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409-10 (1953); *Preston v. Frantz*, 11 F.3d 357, 358 (CA2 1993) (*per curiam*), *cert. dismissed*, 513 U.S. ___, 115 S. Ct. 31 (1994). As this Court recognized in *Foremost*:

> Although the primary focus of admiralty jurisdiction is unquestionably the protection of maritime commerce, petitioners take too narrow a view of the federal interest sought to be protected. The federal interest in protecting maritime commerce cannot be adequately served if admiralty jurisdiction is restricted to those individuals actually *engaged* in commercial maritime activity. This interest can be fully vindicated only if *all* operators of vessels on navigable waters are subject to uniform rules of conduct. The failure to recognize the breadth of this federal interest ignores the potential effect of noncommercial maritime activity on maritime commerce.

Foremost, 457 U.S. at 674-75 (*emphasis in original*).

The *Foremost* Court stressed the importance of extending admiralty jurisdiction to all aspects of maritime activity. The Court further recognized that this exercise of jurisdiction would be pointless unless the courts which assumed that authority were all applying the same law. Read in the light of

Foremost, Moragne can only have meaning if it is construed as preemptive of state law.[13]

The court of appeals recognized that this case was properly one of admiralty jurisdiction (Pet. App. 7a, n.5), and that with admiralty jurisdiction comes the application of substantive admiralty law. Pet. App. 8a. The court further conceded that even if subject matter jurisdiction were founded solely on diversity of citizenship, "a federal maritime rule of decision applicable to the controversy would still displace a state rule that was in conflict." Pet. App. 7a, n.5; 40 F.3d at 626, n.5. Nevertheless, based on its analysis of the maritime preemption doctrine most recently addressed by this Court in *American Dredging Co. v. Miller*, 510 U.S. ___, 114 S. Ct. 981 (1994), the court of appeals concluded state law would apply because there was no "clear conflict" between state

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[13] The opinion of the Court of Appeals for the Fifth Circuit is even more explicit:

> If we were to hold that admiralty jurisdiction did not reach this litigation, we would be injecting an uncertainty that would plague litigants and the courts. For example, in the case of non-commercial navigators traveling on navigable waters that are shared by more than one state, their obligations and duties would be subject to differing standards depending on their precise location within the territorial jurisdiction of one state or another. Moreover, non-commercial navigators everywhere would be subject to yet another conflict in applicable standards of behavior depending upon whether their activity later turns out to be sufficiently "commercial," and, therefore, solely a matter for the states. Only a uniform admiralty law, extending to non-commercial as well as commercial navigators, avoids these problems.

Foremost v. Richardson, 641 F.2d 314, 316 (CA5 1981).

and federal law. Pet. App. 39a. *American Dredging* does not, however, support the court's decision.

American Dredging arose when a seaman was injured while in the course of his employment in Pennsylvania. After receiving medical treatment in Pennsylvania, New York and Mississippi, he eventually filed suit in Louisiana state court seeking damages under the Jones Act and general maritime law. American Dredging obtained a dismissal of the action under the doctrine of *forum non conveniens*. After a lower appellate court affirmed, the Supreme Court of Louisiana reversed the dismissal, upholding the validity and applicability of a state law revoking the doctrine of *forum non conveniens* in Jones Act cases. American Dredging's petition for certiorari was granted, the issue being whether the Louisiana statute abolishing *forum non conveniens* had been preempted by federal maritime law.

In considering whether federal law was preemptive, the Court recognized the traditional coextension of state and federal admiralty jurisdiction. The Court also conceded its previous decisions in this area had not been dispositive:

> [I]t would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernable in our admiralty jurisprudence, or indeed is even entirely consistent within our admiralty jurisprudence. Compare *Kossick* [*v. United Fruit Co.*, 365 U.S. 731, 81 S. Ct. 886 (1961)] (state law cannot require provision of maritime contract to be in writing), with *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 75 S. Ct. 368 (1955) (state

> law can determine effect of breach of warranty in marine insurance policy).

American Dredging, 510 U.S. ___, 114 S. Ct. at 987-88. While recognizing the lack of clarity in this Court's prior decisions, the court of appeals overlooked the very guidance it was seeking, which appears immediately following the language quoted above:

> Wherever the boundaries of permissible state regulation may lie, they do not invalidate state rejection of *forum non conveniens*, which is in two respects quite dissimilar from any other matter that our opinions have held to be governed by federal admiralty law: it is procedural rather than substantive, and it is most unlikely to produce uniform results.

American Dredging, 114 S. Ct. at 988.

Justice Souter's concurring opinion is even more succinct:

> I join in the opinion of the Court because I agree that in most cases the characterization of a state rule as substantive or procedural will be a sound surrogate for the conclusion that would follow from a more discursive preemption analysis. The distinction between substance and procedure will, however, sometimes be obscure. As to those close cases, how a given rule is characterized for purposes of determining whether federal maritime law preempts state law will turn on whether the state rule unduly interferes with the federal interest in maintaining the free flow of maritime commerce.

American Dredging, 114 S. Ct. at 990 (Souter, J., concurring).

Here the question is whether state wrongful death statutes or federal maritime common law provide the substantive law of the case. This is therefore not one of the "close cases" in which the distinction between substance and procedure is obscure. Indeed, it would be difficult to imagine an area of law more clearly substantive. Thus, even under an *American Dredging* analysis, general maritime law applies.[14]

B. *Moragne* And Its Progeny Provide The Substantive Law Applicable To All Deaths On Territorial Waters

1. Pre-*Moragne* – Statutory Maritime Remedies

Between 1886 and 1970, federal maritime law did not provide a remedy for wrongful death on the nation's territorial waters unless the decedent qualified as a seaman under the Jones Act, 46 U.S.C. § 688. In *Moragne v. States Lines, Inc.*, 398 U.S. 375 (1970), this Court reversed three quarters of a century of precedent and recognized "a right to recover for wrongful death under general maritime law." *Id.* at 401. This right was established to "assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts." *Id.*

The decedent in *Moragne* was a longshoreman, rather than a recreational boater. Since *Moragne*, however, this Court and others have consistently and unequivocally

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[14] The *American Dredging* case is discussed in greater detail in Petitioners' letter brief dated April 20, 1994 and submitted at the request of the court of appeals following oral argument. This brief appears at J.A. 16.

applied the general maritime remedy announced in *Moragne* to all categories of decedents killed on territorial waters. The reasons for this expanded application can only be understood in the context of the problems *Moragne* was intended to correct.

Seventy-five years before *Moragne*, in *The Harrisburg*, 199 U.S. 199 (1886), this Court held that federal maritime law did not provide a remedy for wrongful death in the absence of an applicable state or federal statute. No federal maritime statutes were in force at that time, and many or most of the states followed the English common law rule precluding recovery for wrongful death under any circumstance. In the latter part of the nineteenth century, states began enacting wrongful death statutes, some of which extended for the benefit of those killed on territorial waters or the high seas.[15]

The efficacy of applying state statutes to what were essentially maritime claims was called into serious question by this Court in *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917). In *Jensen*, the Court precluded application of a New York state workmen's compensation statute to a longshoreman on board a vessel docked in navigable waters as an unconstitutional invasion of federal interests. In the words of the Court, "the necessary consequences [of the allowance of the state law remedy] would be the destruction of the very uniformity in respect to

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[15] For deaths which occurred on the high seas, recovery could only be pursued under a limited number of state wrongful death statutes. *The Hamilton*, 207 U.S. 398 (1907). Since few state statutes were interpreted to apply on the high seas, most deaths on the high seas did not permit a cause of action. *Moragne*, 398 U.S. at 393 n.10.

maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded." *Id.* at 217.

After *Jensen*, questions continued to arise regarding the appropriate substantive law to be applied in admiralty. Some state statutes permitted recovery for maritime deaths; others did not. What was to happen when a death occurred in waters at the border of two states – only one of which offered a maritime death remedy? Was it fair, in a federal system of law, for two claimants to receive different compensation under circumstances indistinguishable apart from their state citizenship? As far as the maritime death action had evolved, differing substantive laws would apply and different remedies awarded, based solely on the fortuitous location of the injury. Aware of the inequities of this situation, Congress took the first steps toward effectuating a uniform structure of maritime recovery by passing a series of landmark statutes.

The first of these statutes was the Death on the High Seas Act ("DOHSA"), 46 U.S.C. §§ 761-68, which provided a remedy for deaths which occurred at sea more than a marine league (three nautical miles or 3.45 land miles) from the shore of any state, district, territory or dependency of the United States. The right of action under DOHSA accrues to the personal representative of the decedent for the exclusive benefit of the decedent's spouse, parent(s), child(ren) or dependent relative. 46 U.S.C. § 761. Recovery under DOHSA is limited to fair and just compensation for the pecuniary losses sustained by the persons for whose benefit suit is being brought

and is to be apportioned among them in proportion to the loss each has suffered. 46 U.S.C. § 762.

The second maritime statute passed by Congress was the Merchant Marine Act of 1920 (also known as the Jones Act), 46 U.S.C. § 688. The Jones Act death action extended to seamen the protections of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 1, *et seq.*, granting seamen a personal injury and wrongful death remedy for the negligence of their employers. A wrongful death claim under the Jones Act must be brought by the personal representative of the deceased for the benefit of a specified class of beneficiaries, which include the surviving spouse and children, and if none, then the seaman's parents, and if none, dependent next of kin. The Jones Act has also consistently been interpreted to limit recoverable damages to pecuniary losses. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 20, 32 (1990).

The statutory framework of maritime remedies was completed in 1927 with the passage by Congress of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901, *et seq.*, which granted to longshoremen and harbor workers the right to receive workers' compensation benefits from their employers for accidental injury or death arising out of their employment. The LHWCA preempted state compensation statutes and provided a uniform remedy to the land-based maritime employee. 33 U.S.C. § 901, *et seq.*[16]

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[16] In 1972, Congress amended the Act, revoking the right to bring an action for unseaworthiness, but permitting a statutory cause of action for negligence against a vessel, including a remedy for wrongful death. 33 U.S.C. § 905(b).

Although these three statutes made major inroads toward maritime uniformity, they were not sufficient to accomplish this goal in and of themselves because none of them applied to the deaths of non-Jones Act seamen in territorial waters. Recovery in such cases continued to depend on whether and the degree to which the law of the state adjacent to the accident recognized an action for maritime wrongful death. Since there was no uniform body of maritime wrongful death law, the potential existed for as many different remedies (or no remedy at all) as there would be states addressing deaths on their territorial waters.

2. *Moragne* – Filling The Gap

It was against this backdrop that the Court accepted certiorari in *Moragne*, which involved an unseaworthiness claim asserted by the widow of a longshoreman killed in Florida's territorial waters. Since the law of Florida did not provide for a wrongful death action based on unseaworthiness, the widow's claim was barred by the rule of *The Harrisburg*. The United States, as *amicus curiae*, urged the Court to eliminate the anomalies created by *The Harrisburg* and reestablish uniformity in maritime wrongful death law by creating a general federal maritime action for wrongful death caused by negligence or unseaworthiness and applicable in all territorial waters. Noting that every state in the union had by then enacted a wrongful death statute, *Moragne*, 398 U.S. at 390, and that Congress had enacted the Jones Act and DOHSA, this Court concluded that such actions were by then part of the nation's basic jurisprudence. By unanimous

decision, the Court overruled *The Harrisburg*, thus establishing a general maritime wrongful death action which would complement the federal maritime statutes.

3. Post-*Moragne* – Sealing the Cracks

In 1990, this Court decided *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). *Miles* was a claim by the mother of a Jones Act seaman who was murdered while on board a vessel docked in the territorial waters of the State of Washington. Mrs. Miles alleged both Jones Act negligence and breach of the warranty of seaworthiness under general maritime law and sought damages for both wrongful death and survival.

Much of the *Miles* opinion is devoted to the legal history of the maritime death action, with particular attention to the rationale and objectives of the Court in *Moragne*. The *Miles* Court noted the statutory attempts to "achieve uniformity," the anomalies created by unanticipated jurisprudential developments, and the government's plea, as amicus, "to eliminate these inconsistencies and render maritime wrongful death law uniform." *Miles*, 498 U.S. at 26. The Court "described *Moragne* at length because it exemplifies the fundamental principles that guide our decision in this case. . . . ", *Id.* at 27, and specifically concluded that "*Moragne* intended to create a general maritime wrongful death action applicable *beyond the situation of longshoremen.*" *Id.* at 30 (emphasis added). The Court further held that, in the context of *Miles*, *Moragne* extended the DOHSA wrongful death remedy to territorial waters, 498 U.S. at 29, and that such extension

"will further, rather than hinder, 'uniformity in the exercise of maritime jurisdiction.' " *Id.* at 29 (citing *Moragne*, 398 U.S. at 396, n.12).[17]

This Court has not directly ruled on *Moragne*'s applicability to accidents involving civilians. The question has, however, previously been before the Court. In *Texaco Refining & Marketing, Inc. v. Estate of Dau Van Tran*, 808 S.W.2d 61 (Tex.), *cert. denied*, 502 U.S. 908, (1991), the decedent, like Natalie Calhoun a civilian, stopped to help the captain of a shrimp boat free his propeller and was killed when a wave unexpectedly crushed him against a dock. The decedent's estate sued in Texas state court for negligence and violation of maritime regulations under the Texas Wrongful Death and Survivorship Statutes. The trial court, applying Texas state tort law, rendered judgment against Texaco and awarded damages for the survivors' mental anguish, loss of society and prejudgment interest. The Texas Court of Appeals affirmed. 777 S.W.2d 783. Subsequently, this Court granted certiorari, vacated the appellate judgment, 497 U.S. 358, and remanded the

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[17] In *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), Justice Stevens writing for the majority stated:

> *Moragne* proclaimed the need for uniformity in a far more compelling context. When *Moragne* was decided, fatal accidents on the high seas had an adequate federal remedy, while the same accidents nearer shore might yield more generous awards, or none at all, depending on the law of the nearest State. The only disparity which concerns us today is the difference between applying one national rule to fatalities in territorial waters and a slightly narrower national rule to accidents farther from land.

Id. at 624, n.18.

cause of action to the Texas Court of Appeals for further reconsideration in light of its then-recent ruling in *Sisson v. Ruby*, 497 U.S. 358 (1990). On remand, the Texas Court of Appeals reaffirmed its original decision, 795 S.W.2d 870, and the case proceeded to the Supreme Court of Texas.

The Texas Supreme Court concluded the Texas Court of Appeals had erred in its application of state tort law and, accordingly, reversed. Finding general maritime jurisdiction appropriate, the court stated:

> Where applicable *and* properly invoked, general maritime law preempts state law causes of actions and remedies, consistent with the longstanding desire of Congress and the judiciary to achieve uniformity in the exercise of admiralty jurisdiction pursuant to the U.S. Constitution, Art. 3, § 2, cl. 1.

Dau Van Tran, 808 S.W.2d at 63, (emphasis in original) citing *Foremost*, 457 U.S. 668, 676-77 (1982). The Texas Supreme Court then awarded damages to the surviving parents according to federal maritime law. When again asked to review the case, this time by the decedent's estate, this Court declined to do so. *Dau Van Tran*, 502 U.S. 908 (1991).

Other courts have expressly recognized the applicability of *Moragne* in circumstances similar or identical to this case. In *Wahlstrom v. Kawasaki Heavy Industries, Ltd.*, 4 F.3d 1084 (CA2 1993), *cert. denied*, 510 U.S. ___, 114 S. Ct. 1060 (1994), a case which is factually indistinguishable from this case, the Second Circuit stated:

> The Court [in *Moragne*] was addressing the specific issue of what, if any, remedy should be available for a wrongful death caused within state territorial waters by a vessel's unseaworthiness,

> a claim for which there was no remedy under applicable state law. [*Moragne* at 376-77]. In fashioning the remedy, however, the Supreme Court did not limit the new right of recovery to unseaworthiness claims, but instead established a general remedy for wrongful death under maritime law.

Scott Wahlstrom was killed when his personal watercraft collided with a 20-foot powerboat on the Thames River, a navigable waterway located in Connecticut. While conceding that the case fell within the admiralty jurisdiction of the federal courts, the plaintiffs argued federal maritime law did not preclude application of individual state wrongful death statutes and that Connecticut products liability and wrongful death laws should therefore govern their cause of action. In the alternative, the plaintiffs maintained that if the court found federal maritime law governed, it should look to the Connecticut wrongful death provisions in fashioning the federal remedy.

The Second Circuit rejected both of these assertions. Recognizing the importance of uniformity in maritime law, the court held that wrongful death under the general maritime law necessarily excludes the peculiarities of individual state remedial statutes. 4 F.3d at 1089. Premising its holding on this Court's precedent, "which over the past thirty-three years [sic], has transformed the face of the federal maritime wrongful death remedy," the Second Circuit held that federal maritime law, whether or not in conflict with an individual state's law, precludes application of state law and governs all actions for wrongful death and survival occurring in navigable territorial waters falling under the admiralty jurisdiction of the federal courts. *Id.* at 1087-89.

Other courts addressing the question of substantive law applicable to deaths involving recreational boats on state waters have uniformly applied the *Moragne* remedy. *See, e.g., Kelly v. Panama Canal Comm'n*, 26 F.3d 597 (CA5 1994) (recreational boating accident on Panama Canal, general maritime law will apply to death claim); *Walker v. Braus*, 995 F.2d 77 (CA5 1993) (recreational boating collision on state inland waterway, federal maritime law will determine recovery for wrongful death); *Anderson v. Whittaker Corp.*, 692 F. Supp. 764 (W.D. Mich. 1988) (recreational boat capsized in Lake Michigan, survivors' claims to be determined under federal maritime law, not state law), *aff'd in part, rev'd in part on other grounds*, 894 F.2d 804 (CA6 1990); *Spiller v. Thomas M. Lowe, Jr. & Assocs., Inc.*, 466 F.2d 903 (CA8 1972) (survey boat capsized on Red River in Arkansas, court recognized general maritime death action, not state remedial statutes); *Sutton v. Earles*, 26 F.3d 903 (CA9 1994) (collision between pleasure boat and Navy buoy, applicable substantive law for death actions is general maritime law). *See also Barbe v. Drummond*, 507 F.2d 794 (CA1 1974) (DOHSA action involving recreational boat, court recognized federal maritime survival action analogous to *Moragne* wrongful death action); *Greene v. Vantage S.S. Corp.*, 466 F.2d 159 (CA4 1972) (general federal maritime law applies to death of longshoreman on territorial waters); *St. Hilaire Moye v. Henderson*, 496 F.2d 973 (CA8), *cert. denied*, 419 U.S. 884 (1974) (recreational boat accident on Arkansas River, federal maritime law preempts application of state law); *Mink v. Genmar Indus., Inc.*, 29 F.3d 1543 (CA11 1994) (maritime recreational injury case comes within admiralty jurisdiction, substantive federal maritime law applies, including

uniform three-year statute of limitations for maritime torts, 46 U.S.C. § 763a (Supp. 1993)).

In addition to the Courts of Appeal noted above, numerous federal district and state supreme courts have held that federal maritime law will displace state law in the civilian/recreational maritime death context. In *Gilmore v. Witschorek*, 411 F. Supp. 491, 494 (E.D. Ill. 1976), a recreational boat death case, the court made the following ruling on a motion to dismiss, stating:

> The United States Supreme Court thus created a general maritime claim for wrongful death clearly applicable to a situation such as this [a collision between two pleasure boats], where the accident allegedly occurred on state navigable waters. The existence of this new right avoids the application of state wrongful death statutes and brings the claim within the ambit of the general maritime law where suits are governed by federal substantive law and procedural law.

See also Choat v. Kawasaki Motors Corp., No. 1920544, 1994 WL 221417 (Ala., May 27, 1994) (swimmer killed by "jet ski" on navigable waters, with admiralty jurisdiction comes application of substantive maritime law); *Newhouse v. United States*, 844 F. Supp. 1389 (D. Nev. 1994) (collision between recreational boat and vessel operated by the U.S. Park Service; court applied federal maritime law); *Frantz v. Brunswick Corp.*, 866 F. Supp. 527 (S.D.Ala. 1994) (general maritime law governs damages recoverable from recreational boating accident); *Lipworth v. Kawasaki Motors Corp., U.S.A.*, 592 So. 2d 1151 (Fla. Dist. Ct. App.) (federal maritime law, not state law, applies to "jet ski" collision death), *cert. denied*, 506 U.S. ___, 113 S. Ct. 465 (1992); *Cantore v. Blue Lagoon Water Sports, Inc.*, 799 F. Supp. 1151 (S.D. Fla. 1992) (death resulting from collision between

two personal watercraft, federal maritime law, not state remedial statutes, controls); *Texaco Ref. & Marketing, Inc. v. Estate of Dau Van Tran*, 808 S.W.2d 61 (Tex.) *cert. denied*, 502 U.S. 908 (1991); *Estate of Fajardo v. Maersk Line Agency, Inc.*, No. Civ. A. R-88-274, 1988 WL 168532 (D. Md., Nov. 30, 1988) (drowning death of minor child caused by passing ship's wake, claim determined under federal maritime law, not state law); *Truehart v. Blandon*, 672 F. Supp. 929 (E.D. La. 1987) (pleasure boat collision with bridge results in death, general maritime death action precludes state remedial statutes in territorial waters).[18]

C. The Decision Of The Court Of Appeals Is Not In Accordance With Maritime Law

1. There Is No Split Of Authority: *Moragne* Displaces State Wrongful Death Statutes

While conceding that "Yamaha has been able to muster considerable support for its position that *Moragne* displaces all state law wrongful death statutes" (Pet. App. 35a, n.37; 40 F.3d at 641, n.37), the court of appeals says the case law "appears to be split on this issue." *Id.* There is no such split.

The cases cited by the court of appeals as evidencing the split of authority do nothing of the sort. *Ellenwood v. Exxon Shipping Co.*, 984 F.2d 1270 (CA1), *cert. denied*, 508

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[18] Thomas Schoenbaum also acknowledges federal preemption of state law remedies in his treatise, *Admiralty and Maritime Law*, § 8-3 (2d ed. 1994). Discussing the *Moragne* wrongful death action, he states: "Thus the new *Moragne* wrongful death action preempts state wrongful [death] [sic] statutes within the area of admiralty jurisdiction." *Id.* at 472 (citations omitted).

U.S. ___, 113 S. Ct. 2987 (1993), was an employment discrimination case in which the employer removed the plaintiff from his position as chief engineer of a tanker because he had completed an alcohol rehabilitation program. The Third Circuit cited *Ellenwood* for the premise that, in areas in which Congress has not entirely displaced state regulation, state law will be given effect if it does not frustrate a fundamental tenet of admiralty law. In *Ellenwood*, however, there was no well-established body of maritime employment discrimination law. In this case, there exists a large body of federal maritime wrongful death law that has steadily evolved since the *Moragne* decision in 1970. In fact, the *Ellenwood* court itself recognized and noted the importance of *Moragne* and its progeny:

> Maritime law historically has appreciated the leading role of state statutes in creating additional bases of recovery. *In maritime wrongful death cases, for example, remedies first were provided solely under state law.* When Congress enacted maritime wrongful death legislation in 1920, it provided remedies only where state law did not. *State statutes continued to play a primary role for another fifty years, until the Supreme Court created a general maritime cause of action for wrongful death. See Miles*, 498 U.S. at 23-27; *Moragne*, 398 U.S. at 398-402.

Ellenwood, 984 F.2d at 1280 (emphasis added; citations and footnotes omitted). The use of the words "first" and "until" in this quoted portion of the opinion clearly signals a recognition that, after *Moragne*, state statutes for wrongful death are supplanted by the federal maritime law.

The Third Circuit also referenced *Lyon v. Ranger III*, 858 F.2d 22 (CA1 1988), for the proposition that Massachusetts law would provide the rule of decision for a wrongful death in Massachusetts' territorial waters. This is an incorrect interpretation of this holding. In *Lyon*, the survivors of a scuba diver who was struck and killed by a whale-watch ship brought a wrongful death action under *Moragne*. *See, Lyon*, 858 F.2d at 24. The court only applied Massachusetts law to the very specific issue of whether the negligence of the plaintiff's fellow divers should be imputed to the deceased diver under the theory of joint enterprise liability, an issue admiralty law had not addressed. Massachusetts law was *not* applied to the question of damages for wrongful death; in fact, the wrongful death aspects of the *Lyon* case were determined under federal maritime law, applying *Moragne*.

In *Favorito v. Pannell*, 27 F.3d 716 (CA1 1994), a 12-foot inflatable yacht tender collided with two vessels moored in the harbor at Newport, Rhode Island. Two of the tender's passengers were injured. The Third Circuit noted that substantive Rhode Island law was applied to this maritime collision case. However, *Favorito* is plainly distinguishable since it is not a death case and *Moragne* is therefore not implicated. Moreover, just as in *Lyon*, the *Favorito* court looked to Rhode Island law not for guidance on the issue of damages but for questions such as negligent entrustment and respondeat superior. In fact, maritime cases involving personal injury are also decided pursuant to general federal maritime law. *See, e.g., Medina v. Perez*, 733 F.2d 170 (CA P.R.), *cert. denied*, 469 U.S. 1106 (1984); *Carey v. Bahama Cruise Lines*, 864 F.2d 201 (CA1 1988).

Marine Transportation Services Sea-Barge Group, Inc. v. Python High Performance Marine Corp., 16 F.3d 1133 (CA11 1994), was a cargo loss action in which one of the issues before the court was the doctrine of equitable estoppel. In a brief footnote, the Eleventh Circuit mildly chastised the district court for utilizing Florida law and stated that under admiralty jurisdiction, the court should have looked to general maritime law as developed by the federal courts to decide this issue. The Eleventh Circuit went on to say in essence that no harm was done because Florida law is similar to federal common law on this subject. *Python*, 16 F.3d at 1139 n.8.

As *Moragne* and the subsequent cases that have applied and interpreted it make clear, admiralty wrongful death claims arising within territorial waters are not to be decided under state law. Rather, where no federal statute is specifically applicable, the remedy is to be determined under a uniform system of federal common law, regardless of who is killed or where the accident takes place.

The thrust of the post-*Moragne* cases is contrary in jurisprudential approach to the inferences drawn by the Third Circuit – that state wrongful death statutes apply where maritime accidents occur within a marine league of shore. As this Court stated in *Miles v. Apex Marine*, 498 U.S. 19 (1990), the creation of the general maritime wrongful death cause of action is not only consistent with the general policy of DOHSA and the Jones Act, but effectuates the "constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country.' " Citing *Moragne, supra*, 398 U.S. at 402, quoting *The Lottawanna*, 21 Wall. (88 U.S.) 558, 575 (1875).

2. The Decision Of The Court Of Appeals Misapprehends *Tallentire* And *Moragne*

The court of appeals relied heavily on this Court's decision in *Off-Shore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986), for the proposition that state wrongful death statutes can provide the remedy in this case. That reliance is misplaced. In *Tallentire*, the widows of offshore drilling platform workers killed in a helicopter crash thirty miles offshore sought to obtain death remedies under DOHSA and the Louisiana wrongful death statute. Although the precise holding of *Tallentire* is that DOHSA, where applicable, provides the sole remedy for wrongful death to the exclusion of state law, the Court also engaged in an extensive discussion of Section 7 of that Act, which provides, in relevant part:

> The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this Act.

46 U.S.C. § 767. The Court concluded that Section 7 was merely intended to recognize concurrent state court jurisdiction to entertain actions brought under DOHSA, making it the functional equivalent of the "savings-to-suitors" clause, 28 U.S.C. § 1333. The "savings-to-suitors" clause permits state courts to adjudicate maritime actions, but " . . . the extent to which state law may be used to remedy maritime injuries is constrained by a so-called 'reverse-Erie doctrine' which requires that the substantive remedies afforded by states conform to governing federal maritime standards." *Tallentire*, 477 U.S. at 223 (citations omitted).

The court of appeals read *Tallentire* to suggest "that DOHSA was affirmatively intended to preserve state wrongful death remedies for survivors of people killed in territorial waters." Pet. App. 38a; 40 F.3d at 642. In fact, *Tallentire* says nothing of the sort. The original draft of Section 7 provided that "[t]he provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this Act *as to causes of action accruing within the territorial limits of any State.*" 477 U.S. at 221 (emphasis added). Thus, *as originally proposed*, Section 7 "ensured that the Act saved to survivors of those killed on territorial waters the ability to pursue a state wrongful death remedy in state court." *Id.* at 224-25.

Section 7 was not enacted as it had been originally proposed. In the final version, the phrase emphasized in the above quote from *Tallentire* was deleted. While the Court construed Section 7 to be jurisdictional in nature, the fact remains that, *as enacted*, it does not evidence any intent on the part of Congress "to preserve state wrongful death remedies for the survivors of people killed in territorial waters." Pet. App. 38a; 40 F.3d at 642. To the contrary, one could draw the opposite conclusion, as the language which might arguably have indicated such an intent ended up on the cutting room floor. By suggesting this Court's reference to unadopted statutory language is "tell[ing] us" that state wrongful death statutes continue to govern deaths in territorial waters, the court of appeals misconstrues *Tallentire*.[19]

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[19] This Court has cautioned us that Congressional inaction should not be confused with Congressional intent:

> Nor do we think that Congress' failure to take action on [a bill which would have extended DOHSA to

Tallentire does not answer the question of whether the legislative history of DOHSA evinces an intent by Congress to preclude the creation of a maritime common-law wrongful death remedy applicable in territorial waters. The *Moragne* Court, however, squarely addressed this issue and concluded it did not:

> . . . There should be no presumption that Congress has removed this court's traditional responsibility to vindicate the policies of maritime law by ceding that function exclusively to the states. However, respondents argue that an intent to do just that is manifested by the portion of the Death on the High Seas Act quoted above [Section 7].
>
> The legislative history of the Act suggests that respondents misconceive the thrust of the congressional concern. . . . The discussion of the bill on the floor of the House evidenced the same concern that a cause of action be provided "in cases where there is now no remedy," 59 Cong.Rec. 4486, and at the same time that "the power of the States to create actions for wrongful death in no way be affected by enactment of

---

territorial waters] or to pass a similar measure over the years as the law of deaths on territorial waters became more incongruous, provides guidance for the course we should take in this case. To conclude that Congress, by not legislating on this subject, has in effect foreclosed, by negative legislation as it were, reconsideration of prior judicial doctrine would be to disregard the fact that "Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law." (citations omitted)

Moragne, 398 U.S. at 405, n.17.

the federal law." *The Tungus v. Skovgaard*, 358 U.S., at 593, 79 S. Ct., at 507.

Read in light of the state maritime law in 1920, we believe this legislative history indicates that Congress intended to ensure the continued availability of a remedy, historically provided by the States, for deaths in territorial waters; its failure to extend the Act to cover such deaths primarily reflected the lack of necessity for coverage by a federal statute rather than an affirmative desire to insulate such deaths from the benefits of any federal remedy that might be available independently of the Act. The void that existed in maritime law up until 1920 was the absence of any remedy for wrongful death on the high seas. Congress, in acting to fill that void, legislated only to the three-mile limit because that was the extent of the problem. The express provision that state remedies in territorial waters were not disturbed by the Act ensured that Congress' solution of one problem would not create another by inviting the courts to find that the Act pre-empted the entire field, destroying the state remedies that had previously existed.

. . . .

. . . Congress merely declined to disturb state remedies at a time when they appeared adequate to effectuate the substantive duties imposed by general maritime law. That action cannot be read as an instruction to the federal courts that deaths in territorial waters, caused by breaches of the evolving duty of seaworthiness, must be *damnum absque injuria* unless the States expand their remedies to match the scope of the federal duty.

> To put it another way, the message of the Act is that it does not by its own force abrogate available state remedies; no intention appears that the Act have the effect of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law.

Moragne, 398 U.S. at 397-400 (footnotes omitted). Thus, *Tallentire* does not support the Third Circuit's decision that state wrongful death statutes remain applicable in territorial waters,[20] for reasons explicit in *Moragne*.

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[20] While the Third Circuit noted that one commentator (referencing 14 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3672 (Supp. 1994)) believes that the implication of the *Tallentire* decision is that survivors of a person killed in territorial waters may seek recovery under a state wrongful death statute (Pet. App. 24), Judge Pollak correctly disagreed with that commentator's conclusion:

> . . . [T]he Supreme Court's post-*Gaudet* jurisprudence seems to me cumulatively to run *against* a conclusion that state statutes can of their own force have some share in defining what a cause of action may be which arises from a death in the navigable waters, whether on the high seas or on the territorial waters and without regard to whether the decedent is a seaman or a longshoreman on the one hand or a civilian on the other.
>
> . . . .
>
> What I think is clear from Justice Stevens' identification of the two "national rules" is that the Court saw not merely the DOHSA claim but the *Gaudet* claim, which potentially was a more favorable one for the plaintiff, as claims of national architecture. The one was a statutory claim, the DOHSA claim. The other, a judicially created one. To that extent, I think Mobil Oil carried on what was essentially the central logic of

The error of the court of appeals' conclusion that state law remains applicable in territorial waters after *Moragne* is further demonstrated by its reliance on *The Tungus v. Skovgaard*, 358 U.S. 588 (1959). Pet. App. 36a, n.39; 40 F.3d at 641, n.39. In *The Tungus*, a unanimous Court approved the application of state law to a wrongful death that would have otherwise been without remedy under *The Harrisburg*. 358 U.S. at 596. However, the Court split sharply over whether state law was to be wholly incorporated within maritime law subject to its conditions and limitations, 358 U.S. at 592, or whether admiralty law should utilize state law to supply the remedy without its restrictions. *Id.* at 597. Because the *Moragne* Court expressly overruled *The Harrisburg* rather than *The Tungus*, the court of appeals concluded state law remained applicable after *Moragne*. Pet. App. 36a, n.39; 40

> *Moragne* and *Gaudet* themselves – the understanding that the Supreme Court was authorizing the creation of a federally judicially defined cause of action, one which possibly would draw on state law sources but not because state law sources held any direct primacy.
>
> . . . .
>
> To recapitulate this portion of the opinion, my conclusion is that whatever recovery may be had for a death befalling someone who is not a seaman and not a longshoreman in territorial waters is dictated by a *national* and hence *uniform* federal maritime claim.

Pet. App. 63a-65a (emphasis in original).

The Wright, Miller & Cooper analysis of this point also formed the rationale for the Texas Appellate Court's decision in *Dau Van Tran*, 795 S.W.2d 870, when it affirmed its earlier decision and applied state law remedies. Of course, the Supreme Court of Texas later overruled that decision, after which this Court denied further review. *Dau Van Tran*, 502 U.S. 908 (1991).

F.3d at 641, n.39. This conclusion totally misreads this Court's analysis of *The Tungus vis-a-vis The Harrisburg*. In *Moragne*, Justice Harlan wrote:

> The extent of the role to be played by state law under *The Tungus* has been the subject of substantial debate and uncertainty in this Court, *see Hess v. United States*, 361 U.S. 314, 80 S. Ct. 341, 4 L.Ed.2d 305 (1960); *Goett v. Union Carbide Corp.*, 361 U.S. 340, 80 S. Ct. 357, 4 L.Ed.2d 541 (1960), with opinions on both sides of the question acknowledging the shortcomings in the present law. *See* 361 U.S., at 314-315, 338-339, 80 S. Ct., at 343, 356. On fresh consideration of the entire subject, we have concluded that the primary source of the confusion is not to be found in *The Tungus*, but in *The Harrisburg*, and that the latter decision, somewhat dubious even when rendered, is such an unjustifiable anomaly in the present maritime law that it should no longer be followed.

398 U.S. at 378.

The court of appeals concluded the statement that "the primary source of the confusion . . . is not to be found in *The Tungus*, but in *The Harrisburg*" meant *The Tungus* "retains vitality post-*Moragne*." Pet. App. 36a, n.39; 40 F.3d at 641, n.39. Read in context, however, it is obvious the overruling of *The Harrisburg* was anything but an endorsement of *The Tungus*. The primary source of existing confusion was found in *The Harrisburg*, not *The Tungus*, because it was *The Harrisburg*, not *The Tungus*, which permitted application of state law in the first place. Surely in overruling *The Harrisburg*, the Court intended to accomplish more than simply shifting the primary source of confusion to *The Tungus*. If state statutes still apply

after *Moragne*, what did *Moragne* accomplish? How has any confusion been alleviated?

The demise of *The Harrisburg* was intended to leave a uniform national remedy in its wake, and the creation of the *Moragne* remedy rendered *The Tungus* line of inquiry moot. That this Court in *Moragne* in effect, if not explicitly, overruled *The Tungus* and in doing so intended to provide a uniform maritime wrongful death remedy is evidenced in the penultimate paragraph in *Moragne*:

> . . . [I]n contrast to the torrent of difficult litigation that has swirled about *The Harrisburg*, *The Tungus* which followed it, and the problems of federal-state accomodation they occasioned, the recognition of a remedy for wrongful death under general maritime law can be expected to bring more placid waters.

398 U.S. at 408. State wrongful death statutes thus no longer have a place in maritime law post-*Moragne*.

3. The Decision Of The Court Of Appeals Undermines Maritime Uniformity

In fashioning a common law maritime wrongful death remedy in *Moragne*, this Court emphasized the principles of uniformity underlying maritime law:

> Our recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts. Such uniformity not only will further the concerns of both the 1920

> Acts [referring to DOHSA and the Jones Act] but will also give effect to the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with and operating uniformly in, the whole country.' *The Lottawanna*, 21 Wall. 558, 575 (1875).

398 U.S. at 401-02 (citations and footnote omitted).

In *Miles*, this Court reaffirmed the importance of uniformity as expressed in *Moragne*, on which the Court "rel[ied] primarily" (498 U.S. at 23):

> There is also little question that *Moragne* intended to create a general maritime wrongful death action applicable beyond the situation of longshoremen. . . . If there has been any doubt about the matter, we today make explicit that there is a general maritime cause of action for the wrongful death of a seaman, adopting the reasoning of the unanimous and carefully crafted opinion in *Moragne*.

498 U.S. at 30.

The court of appeals, however, characterized this Court's references to uniformity as mere rhetoric, with "the Court's actions bel[ying] its importance." Pet. App. 26a. The court of appeals "believe[d] that the thrust of [*Moragne*, *Higginbotham*, *Tallentire*, and *Miles*] suggests that the concept of uniformity has a good deal less weight than has been thought. . . . " Pet. App. 27a. A review of these authorities shows the court of appeals has again misunderstood the decisions of this Court.

In *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974), this Court expanded the remedies available under *Moragne* to include recovery for loss of society. These

losses, which are non-pecuniary in nature, are not recoverable under DOHSA. In *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978), this Court declined to allow the DOHSA remedy to be supplemented by a general maritime/*Moragne* recovery in order to award damages on the high seas for loss of society. Similarly, in *Off-Shore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 232 (1986), the Court rejected an attempt to award those same damages in a DOHSA action by supplementation with a state statute which would have allowed recovery for loss of society.

Contrary to the court of appeals' analysis, *Tallentire* and *Higginbotham* do not run against the notion of uniformity. *Gaudet* was decided by the barest of majorities in 1974. By the time *Higginbotham* and *Tallentire* came before the Court, *Gaudet* had been eroded to the point where its continued vitality was in doubt. *See, e.g., Sistrunk v. Circle Bar Drilling Co.*, 770 F.2d 455 (CA5 1985), *cert. denied*, 475 U.S. 1019 (1986); *Truehart v. Blandon*, 672 F. Supp. 929 (E.D. La. 1987). *Higginbotham* itself limited *Gaudet* to coastal waters. 436 U.S. at 623. In *Miles*, this Court eliminated all doubt, wherein it held that the survivors of a seaman killed in territorial waters could not supplement their Jones Act recovery by obtaining loss of society damages under *Gaudet*. In so ruling, the Court stated, "[t]he holding of *Gaudet* applies only in territorial waters and it applies only to longshoremen." *Miles*, 498 U.S. at 31. As the Sixth Circuit recently stated in *Miller v. American President Lines, Ltd.*, 989 F.2d 1450 (CA6 1993), "[*Gaudet*] has therefore been condemned to a kind of legal limbo: limited to its facts, inapplicable on its facts, yet not overruled." *Id.* at 1459.

Uniformity of remedy has been and remains today the touchstone of the decisions of this Court. Viewed as steps along the progression from *Moragne* to *Miles*, *Tallentire* and *Higginbotham* are indicative of the consistent efforts of this Court to unify the remedy for maritime wrongful deaths. Although *Higginbotham* and *Tallentire* both fostered *temporary* disunity between the DOHSA and the *Moragne* general maritime action, the refusal to extend *Gaudet* to the high seas enabled the Court to obtain *long-term* uniformity by implicitly but effectively overruling *Gaudet* in *Miles*. This is precisely what the *Miles* Court intended:

> Our decision also remedies an anomaly we created in *Higginbotham*. Respondents in that case warned that the elimination of loss of society damages for wrongful deaths on the high seas would create an unwarranted inconsistency between deaths in territorial waters, where loss of society was available under *Gaudet*, and deaths on the high seas. We recognized the value of uniformity, but concluded that a concern for consistency could not override the statute. *Higginbotham*, 436 U.S., at 624, 98 S. Ct., at 2014. Today we restore a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law.

498 U.S. at 33. The Third Circuit's decision trivializes and disregards this uniformity principle and, if allowed to stand, would negate the efforts of this Court in *Moragne*, *Higginbotham*, *Tallentire*, and *Miles*. Instead, this Court should continue its efforts to provide a uniform remedy by reversing the court of appeals' decision in this case

and expressly declaring *Moragne* and *Miles* applicable to *all* deaths in territorial waters.

II. THE COURT OF APPEALS HAD AUTHORITY, PURSUANT TO 28 U.S.C. § 1292(b), TO EXERCISE JURISDICTION OVER ANY QUESTION INCLUDED WITHIN THE CERTIFIED ORDER

Rather than addressing the questions of law certified to it, the court of appeals addressed another aspect of the certified order – the underlying premise "that admirality jurisdiction attaches to these several counts [of the complaint] and that they constitute a federal maritime cause of action." Pet. App. 78a. The court of appeals could take this approach because the question it addressed was both included within the order certified for appeal and so inextricably intertwined with the district court's certified question as to be necessary to ensure meaningful review of the latter. As such, the action of the court of appeals was within the letter and intent of 28 U.S.C. § 1292(b), and is consistent with this Court's decisions in *United States v. Stanley*, 483 U.S. 669 (1987) and *Swint v. Chambers County Comm'n*, 514 U.S. ___, 115 S.Ct. 1203 (1995).

In 1958, Congress amended 28 U.S.C. § 1292 to add subsection (b), which provided as follows:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals

> which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Subsection (b) gave discretion to the courts to entertain interlocutory appeals under circumstances broader than those specifically enumerated under 28 U.S.C. § 1292(a). Under subsection (b), appellate jurisdiction is discretionary on two levels. First, the district judge may or may not certify that the order involves a controlling question of uncertain resolution. If the district court makes this determination, the court of appeals may or may not accept the appeal.

Although § 1292(b) obligates the district court to state that the order in question involves a controlling question of law, it does not require the judge to precisely frame the question. 16 Wright, Miller & Cooper, *Federal Practice & Procedure* § 3929 (1977). As such, even where (as in the case herein) the district judge certifies a particular question, most courts have recognized that the court of appeals is not bound by the formulation of the question. Rather, since the appeal is from the order, the court may address any issue necessary to decide the appeal. *See, e.g., Dailey v. National Hockey League,* 987 F.2d 172 (CA3 1993) (where certified question was whether ERISA claim precluded dismissal of action under *Princess Lida* doctrine, court was entitled to determine whether *Princess Lida* doctrine would apply in any event); *In re Cinematronics,* 916 F.2d 1444 (CA9 1990) (certified order

permitted jury trial in "core" bankruptcy proceeding; court of appeals could properly consider whether proceeding was in fact "core" in nature). This Court has also permitted discretionary interlocutory appeals of issues closely related to the decision certified for review. *See, e.g., Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 755-57 (1986) (court of appeals reviewing district court's ruling on preliminary injunction request properly reviewed merits as well); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 172-83 (1974) (court of appeals reviewing district court's order allocating costs of class notification also had jurisdiction to review ruling on methods of notification); *Chicago, R.I. & P.R. Co. v. Stude*, 346 U.S. 574, 578 (1954) (court of appeals reviewing order granting motion to dismiss properly reviewed order denying opposing party's motion to remand); *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 287 (1940) (court of appeals reviewing order granting preliminary injunction also had jurisdiction to review order denying motions to dismiss), all cited in *Swint v. Chambers County Comm'n*, 514 U.S. ___, 115 S. Ct. 1203 (1995).

The latitude granted to the court of appeals is not unlimited. In *United States v. Stanley*, 483 U.S. 669 (1987), a former serviceman who alleged he had secretly been given LSD brought an action against a number of military officers and civilians. The action purported to state separate claims under the Federal Tort Claims Act ("FTCA") and *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). The district court dismissed the FTCA claim, but allowed the *Bivens* count to stand. The court later vacated that portion of its decision relating to the *Bivens* claim. Upon reconsideration, the district court reaffirmed its decision in *Bivens*, but certified its order

pursuant to 28 U.S.C. § 1292(b). On review, the Court of Appeals for the Fifth Circuit affirmed the district court's decision on the *Bivens* claim. Moreover, even though the order from which the interlocutory appeal was taken made no mention of the FTCA count, the court of appeals concluded the plaintiff might have a FTCA claim under recent decisions interpreting the act, and instructed the district court to permit him to amend his complaint.

On appeal, this Court vacated that portion of the decision which had reinstated the FTCA claim:

> An appeal under this status is from the *certified order*, not from any other orders that may have been entered in the case. Even if the Court of Appeals' jurisdiction is not confined to the precise question certified by the lower court (because the statute brings the 'order,' not the question, before the court), that jurisdiction *is* confined to the particular order appealed from. Commentators and courts have consistently observed that 'the scope of the issue open to the court of appeals is closely limited to the order appealed from [and] [t]he court of appeals will not consider matters that were ruled upon in other orders.' 16 C. Wright, A. Miller, E. Cooper, & E. Gressman, Federal Practice and Procedure § 3929, p. 143 (1977). See *Pritchard-Keang Nam Corp. v. Jaworski*, 751 F.2d 277, 281, n. 3 (CA8 1984), cert. dism'd, 472 U.S. 1022, 105 S. Ct. 3491, 87 L.Ed.2d 625 (1985); *United States v. Bear Marine Services*, 696 F.2d 1117, 1119, n. 1 (CA5 1983); *Time, Inc. v. Ragano*, 427 F.2d 219, 221 (CA5 1970).
>
> Here, the 'order appealed from' was an order refusing to dismiss Stanley's *Bivens* claims on the basis of our holding in *Chappell*. The Court

> of Appeals therefore had no jurisdiction to enter orders relating to Stanley's long-dismissed FTCA claims, whether or not, as Stanley argues, 'the issues involved in the *Bivens* claim and the alleged immunity of the individual defendants closely parallels [sic] the government's immunity due to the *Feres* doctrine . . . [and] that is that all parties were arguing about in the interlocutory appeal.'

Stanley, 483 U.S. at 677.

This Court has again recently addressed § 1292(b), although indirectly, in *Swint v. Chambers County Commission*, 514 U.S. ___, 115 S. Ct. 1203 (1995). In *Swint*, the Court of Appeals for the Eleventh Circuit accepted jurisdiction of an order denying summary judgment to individual police officer defendants in a case arising out of alleged civil rights violations in connection with a series of raids on a nightclub. Although the order in question was not certified by the district court pursuant to § 1292(b), the order was appealable because the court had rejected the officers' assertion of qualified immunity to suit. *See Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). The County Commission, which had also filed a summary judgment motion which was denied, also appealed, alleging the denial was immediately appealable as a collateral order under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). Alternatively, the Commission alleged the court of appeals had pendent jurisdiction to consider the Commission's appeal in conjunction with that advanced by the individual defendants.

The court of appeals rejected the collateral order argument, but determined it had "pendent appellate jurisdiction." In rejecting this conclusion, this Court

addressed the statutory limitations of discretionary appellate jurisdiction:

> Congress thus chose to confer on district courts first line discretion to allow interlocutory appeals. If courts of appeals had discretion to append to a *Cohen*-authorized appeal from a collateral order further rulings of a kind neither independently appealable nor certified by the district court, then the two-tiered arrangement § 1292(b) mandates would be severely undermined.

Swint, 115 S. Ct. at 1210 (footnote omitted). Of particular importance to this Court was the legislative history of § 1292(b), wherein a proposal which would have vested the discretion to hear an interlocutory appeal solely with the courts of appeals was rejected. *See Swint*, 115 S. Ct. at 1210, n.4.

The actions of the court of appeals herein are consistent with the express language of § 1292(b) and its historical interpretation, and do not run afoul of any of the proscriptions announced by this Court. The amended order certified by the district court (Pet. App. 78a) reads as follows:

> Natalie Calhoun, the minor child of plaintiffs Lucien B. Calhoun and Robin L. Calhoun, who are Pennsylvania residents, was killed in an accident not far off shore in Puerto Rico, in the territorial waters of the United States. Plaintiffs have brought a diversity suit against, *inter alia*, defendants Yamaha Motor Co., Ltd. The counts of the complaint directed against the Yamaha defendants allege that the accident was caused by a defect or defects in a Yamaha jet ski which Natalie Calhoun had rented and was using at

> the time of the fatal accident. Those counts sound in negligence, in strict liability, and in implied warranties of merchantability and fitness. The district court has concluded that admiralty jurisdiction attaches to these several counts and that they constitute a federal maritime cause of action. The questions of law certified to the Court of Appeals are whether, pursuant to such a maritime cause of action, plaintiffs may seek to recover (1) damages for the loss of the society of their deceased minor child, (2) damages for the loss of their child's future earnings, and (3) punitive damages.

Fairly read, the order asks whether the Calhouns may recover certain items of damages. While not doing so directly, the court of appeals did answer the question: they may recover those damages if state law so provides. Moreover, the district court's order includes the conclusion that "admiralty jurisdiction attaches to [the Calhouns'] several counts and . . . they constitute a federal maritime cause of action." The court of appeals' analysis directly addresses this point, which is both part of the order under appeal and "necessary to decide the appeal." *See, e.g., Dailey, supra.; In re Cinematronics, supra.* The decision does not involve a separate order, as with *Stanley* and *Swint*, and does not substitute the discretion of the court of appeals for that of the district court as to the subject matter of the appeal. For these reasons, the court of appeals acted within its authority under 28 U.S.C. § 1292(b).

CONCLUSION

For the reasons set forth in Section I of this brief, petitioners respectfully urge this Court to reverse the decision of the Third Circuit Court of Appeals.

Respectfully submitted,

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July 26, 1995

(10)

No. 94-1387

Supreme Court, U.S.
FILED
SEP 15 1995
CLERK

In the

Supreme Court of the United States

October Term, 1995

YAMAHA MOTOR CORPORATION, U.S.A. and YAMAHA MOTOR COMPANY, LTD.,

Petitioners,

v.

LUCIEN B. CALHOUN and ROBIN L. CALHOUN, Individually and as Administrators of the Estate of Natalie K. Calhoun, Deceased,

Respondents.

On Writ of Certiorari To the United States Court of Appeals For the Third Circuit

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QUESTIONS PRESENTED

1. Did the court of appeals have jurisdiction to decide whether state or federal law applied in this case, where the court had properly assumed discretionary jurisdiction over this interlocutory appeal, and the question had been decided by the district court as a necessary part of the order that it had certified to the court of appeals?

2. Does the existence of a judicially-created federal remedy for wrongful death in territorial waters displace all state-created remedies, where (a) there is no applicable federal statutory remedy, (b) the decedent was not a seaman or a longshore worker, (c) the accident did not occur aboard a vessel, and (d) the product causing decedent's death could as readily have produced death or injury on an inland lake or river where federal maritime law does not apply?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. THE COURT OF APPEALS HAD JURISDICTION OVER THE QUESTION OF WHETHER FEDERAL LAW DISPLACED STATE LAW IN THIS CASE. 7

II. THE COURT OF APPEALS CORRECTLY HELD THAT MARITIME LAW DOES NOT DISPLACE STATE LAW IN THIS CASE. 13

A. *The Relevant Factors.* 14

B. *The Relevant Decisions and Statutes.* 15

C. *There Are Many Reasons Not to Displace State Law.* 26

1. Preserving State Wrongful Death Remedies Will Not Affect the Primary Conduct of Jet Ski Manufacturers. 27

2. Uniformity is Not a Dispositive Consideration in Admiralty Displacement Analysis. 29

3. Imposing the General Maritime Law Would Further Complicate Maritime Tort Litigation. 32

CONCLUSION 36

TABLE OF AUTHORITIES

Cases **Page**

American Dredging Co. v. Miller, 114 S. Ct. 981 (1994) 27, 29, 32

Askew v. American Waterways Operators, 411 U.S. 325 (1973) 26

Beech-Nut v. Warner-Lambert Co., 480 F.2d 801 (2d Cir. 1973) 10

Brockington v. Certified Electric, Inc., 903 F.2d 1523 (11th Cir. 1990) 30

California v. ARC America Corp., 490 U.S. 93 (1989) 25

Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608 (1992) 18

Francis v. Forest Oil Corp, 628 F.Supp. 836 (W.D.La.), *appeal dismissed*, 798 F.2d 147 (5th Cir. 1986) 30

Freightliner Corp. v. Myrick, 115 S. Ct. 1483 (1995) 34

Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707 (1985) 25

Huron Cement Co. v. Detroit, 362 U.S. 440 (1960) . . 26

Izumi Seimitsu Kogyo v. United States Philips Corp., 114 S. Ct. 425 (1993) 10

Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 115 S. Ct. 1043 (1995) 34

Johnson v. Jones, 115 S. Ct. 2151 (1995) 12

Kelly v. Washington, 302 U.S. 1 (1937) 26

Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959) 29, 31, 33

Kysor Indus. Corp. v. Pet, Inc., 459 F.2d 1010 (6th Cir.), *cert. denied*, 409 U.S. 980 (1972) 10

Lebron v. National R.R. Passenger Corp., 115 S. Ct. 961 (1995) 10

Lowe v. Securities and Exchange Comm'n, 472 U.S. 181 (1985) 11

Mayflower Indus. v. Thor Corp., 184 F.2d 537 (3d Cir. 1950), *cert. denied*, 341 U.S. 903 (1951) . . 10

Miles v. Apex Marine Corp., 498 U.S. 19 (1990) . *passim*

Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978) . . . . . *passim*

Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970) . . . . . *passim*

O'Halloran v. University of Washington, 856 F.2d 1375 (9th Cir. 1988) 10

O'Melveny & Myers v. FDIC, 114 S. Ct. 2048 (1994) 26, 27, 29

Off-Shore Logistics, Inc., v. Tallentire, 477 U.S. 207 (1986) . . . . . *passim*

Panama R.R. v. Johnson, 264 U.S. 375 (1924) 31

Pope & Talbott, Inc. v. Hawn, 346 U.S. 406 (1953) . . 31

Procunier v. Navarette, 434 U.S. 555 (1978) 10

Public Citizen v. United States Dept of Justice, 491 U.S. 440 (1989) 10

Romero v. International Terminal Operating Co., 358 U.S. 354 (1959) 17, 18

Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 (1974) 22

Sisson v. Ruby, 497 U.S. 358 (1990) 34

Smith v. Vulcan Iron Works, 165 U.S. 518 (1897) 9

Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917) 31, 32

Swint v. Chambers County Comm'n, 115 S. Ct. 1203 (1995) 10, 12

The Harrisburg, 119 U.S. 199 (1886) . . . . . *passim*

The Tungus v. Skovgaard, 358 U.S. 588 (1959) 32

Vance v. Terrazas, 444 U.S. 252 (1980) 10

Wahlstrom v. Kawasaki Heavy Indus. Ltd., 4 F.3d 1084 (2nd Cir. 1993), *cert. denied*, 114 S. Ct. 1060 (1994) 3

Zant v. Stephens, 456 U.S. 410 (1982) 8

Statutes

D.C. Code § 11-723 8

Georgia Code § 24-4536 8

42 Pa. Cons. Stat. Ann. § 8301 (1982 & Supp. 1995) . . 2

42 Pa. Cons. Stat. Ann. § 8302 (1992 & Supp. 1995) . . 2

28 U.S.C. § 1254(2) 8, 9

28 U.S.C. § 1292(a)(1) 9, 10

28 U.S.C. § 1292(b) . . . . . *passim*

28 U.S.C. § 1332 2

28 U.S.C. § 1333 2

28 U.S.C. § 2680(d) 7

Longshore and Harbor Workers' Compensation Act,
44 Stat. 1424 (1927), 33 U.S.C. §§ 901 . . . *passim*

33 U.S.C. § 905(b) 24

Jones Act,
38 Stat. 1185 (1915), 46 U.S.C. §§ 688 . . . *passim*

Death on the High Seas Act,
41 Stat. 537 (1920), 46 U.S.C. §§ 761 . . . . *passim*

46 U.S.C. § 762 (repealed) 30

46 U.S.C. § 763a 7, 30, 34

Section 7, 46 U.S.C. § 767 . . . . . 19, 20

Rules

Supreme Court Rules

14.1(a) 9, 10
19.2 9
24(a) 9

Miscellaneous

Argetsinger, *Deaths Rise as More People Ride the Waves*, Washington Post, August 27, 1995 1

Charles A. Wright, et. al., *Federal Practice and Procedure* § 3672 (Supp. 1995) 23

Nordheimer, *It Mimics a Mosquito, But Inflicts Worse Injury*, N.Y. Times, August 27, 1995 1

No. 94-1387

In the

Supreme Court of the United States

October Term, 1995

YAMAHA MOTOR CORPORATION, U.S.A. and YAMAHA MOTOR COMPANY, LTD.,

Petitioners,

v.

LUCIEN B. CALHOUN and ROBIN L. CALHOUN, Individually and as Administrators of the Estate of Natalie K. Calhoun, Deceased,

Respondents.

BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

On July 6, 1989, twelve year-old Natalie Calhoun, on vacation with family friends in Humacao, Puerto Rico, was killed when her "Wavejammer" jet ski went out of control and crashed into a vessel anchored in territorial waters just off the Puerto Rican coast. The Wavejammer, a product of petitioners Yamaha Motor Corp., U.S.A. and Yamaha Motor Company, Ltd., is used for jet skiing — a popular activity among youths and teenagers, and one which has recently produced a steady increase in accidents, resulting in personal injuries and deaths in the inland and coastal waters of the United States. *See* Argetsinger, *Deaths Rise as More People Ride the Waves*, Washington Post, August 27, 1995, at 1, col. 1; Nordheimer, *It Mimics a Mosquito, But Inflicts Worse*

Injury, N.Y. Times, August 27, 1995, at 31, col. 1 (both reporting 56 jet-ski deaths in 1994). In addition to jet-skis, Yamaha also manufactures and distributes motorcycles, all-terrain vehicles, boats, snowmobiles, go-karts, generators, and golf cars.

Respondents Lucien and Robin Calhoun, individually and as administrators of their daughter's estate, brought suit in the Eastern District of Pennsylvania against petitioners, who manufactured and distributed the jet ski that Natalie was using when she was killed. Their amended complaint relied principally on diversity jurisdiction under 28 U.S.C. § 1332, but also noted the availability of admiralty jurisdiction under 28 U.S.C. § 1333 since the death occurred in territorial waters.

The Calhouns sought recovery under Pennsylvania's wrongful death statute, 42 Pa. Cons. Stat. Ann. § 8301 (1982 & Supp. 1995), and its survival statute, 42 Pa. Cons. Stat. Ann. § 8302 (1992 & Supp. 1995), alleging negligence, strict liability, and breach of the implied warranties of merchantability and fitness of purpose. Damages were sought for lost future earnings, loss of society, loss of support and services, and funeral expenses, as well as punitive damages. The amended complaint, as amplified in discovery and subsequent pleadings, focused on the design and manufacture of the jet-ski, and not on any activity that petitioners performed or failed to perform in the waters where Natalie was killed. Thus, in their October 26, 1990 answer to petitioners' interrogatory 18, respondents asserted that the jet ski was an "inherently and unreasonably dangerous and defective product" because "(1) the steering and throttle mechanism was designed and manufactured in a way that contributed to losing control of the jet ski . . . especially for young and new riders. . . . (2) Warnings regarding the dangers of this product were non-existent and the warnings on the product were inadequate in content and placement [; and] (3) The product failed to provide protection to the rider from collisions."

Petitioners moved for partial summary judgment, arguing that damages in the action are governed by federal maritime law, which does not allow recovery for future wages, loss of society, loss of support and services, or punitive damages. The district court agreed in part, holding that the state wrongful death and survival statutes were displaced by the general maritime law, as recognized in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). It then determined that the federal common law remedy prohibited recovery for lost future wages and punitive damages, but permitted damages for loss of society and loss of support and services.

Yamaha then moved for certification of the order granting in part and denying in part its motion for summary judgment, and the Calhouns answered by moving the district court to certify all of its damages rulings pursuant to 28 U.S.C. § 1292(b). On June 21, 1993, the district court agreed and certified its entire order for interlocutory appeal, identifying the question as whether federal maritime law provides a remedy for loss of society and loss of future services and support, on which plaintiffs had prevailed, and for loss of future earnings and punitive damages, on which the district court had ruled for defendants. Less than a month later, on July 16, 1993, a motions panel of the court of appeals agreed to hear both appeals. All of the damages issues, as well as the issue of the applicability of state law including the Second Circuit's then-recent decision in *Wahlstrom v. Kawasaki Heavy Indus. Ltd.*, 4 F.3d 1084 (1993), *cert. denied*, 114 S. Ct. 1060 (1994), which conflicts directly with the decision below, were briefed and argued before a different merits panel.

As an initial matter, the merits panel determined that the proper resolution of the damages question required it to reexamine the predicate ruling of the district court that the federal maritime law displaces all state remedial statutes for wrongful deaths. The court concluded that, because that issue had been decided by the district court and because its

resolution was necessarily antecedent to resolving the damages issue, the court of appeals had jurisdiction to decide that question under 28 U.S.C. § 1292(b). Pet. App 6a-7a. The Third Circuit then concluded that the district court erred in holding that state wrongful death and survival statutes were displaced by federal maritime tort law. *Id.* at 28a-29a.

The court of appeals likened the displacement analysis to standard preemption analysis, where the presumption against preempting state laws requires the courts to construe possibly conflicting federal statutes narrowly. Federal courts must be similarly cautious in the admiralty context, the court warned, displacing state law only where it presents a "clear conflict" with federal law. *Id.* at 13a. With this presumption in mind, the court held that neither state survival nor wrongful death statutes create any conflict with respect to the judicially-created remedy for wrongful death in territorial waters. *Id.* at 28a-29a.

The court observed that neither the Death on the High Seas Act, 46 U.S.C. § 781 ("DOHSA"), nor the Jones Act, 46 U.S.C. § 688, applies to civilians killed in territorial waters and that §7 of DOHSA actually preserves state wrongful death remedies. *Id.* at 28a, 37a-38a. The court also noted that, far from any hostility toward state remedial statutes, this Court has expressly acknowledged the continued vitality of state wrongful death remedies in several of its opinions. *Id.* at 23a-25a. The court recognized that uniformity plays a role in federal maritime law, but noted that uniformity alone has never been sufficient to override statutory objectives or non-conflicting state interests and that there are several instances where federal maritime statutes themselves countenance disuniformity. *Id.* at 26a-27a. Thus, it concluded, state remedies should not be displaced by a *Moragne*-type cause of action, despite the possibility of disuniformity, since there is no "clearly articulated federal statutory scheme" that would warrant displacement of state remedies. *Id.* at 35a. In reaching that conclusion, the court also relied on the substantial countervailing interest that states

retain in policing territorial waters and in protecting their citizens through their own tort laws. *Id.* at 42a.

SUMMARY OF ARGUMENT

1. The court of appeals properly exercised jurisdiction over the issue of whether federal maritime law displaces state law in this case. We agree with petitioners and the United States that the court had jurisdiction under 28 U.S.C. § 1292(b) over the order of the district court regarding the categories of damages that were recoverable in this case, and the district court's ruling that federal rather than state law governed was necessarily antecedent to its ruling on the specific damages available under federal law. The fact that the controlling issue of law identified by the district court related to damages rather than the issue of federal versus state law is of no consequence since section 1292(b) requires the courts to certify *orders*, not *questions*, in contrast to other statutes and rules governing appellate jurisdiction that focus on the question or issue presented, not the order under appeal.

2. The issue before the Court is not whether respondents might have sued petitioners under federal maritime law, but whether the possibility of such a remedy displaces otherwise applicable state law claims based on petitioners' responsibility for the death of Natalie Calhoun. No federal statute displaces or preempts state law remedies for deaths of civilians in territorial waters, or even creates such a right of action. Instead, it is the case law from this Court which created a federal remedy as a supplement to existing but inadequate state law remedies. And, most significantly, that same case law has explicitly recognized the continued viability of state law, even as it created new federal rights.

Petitioners and their *amici* rely on several decisions in which this Court has found a federal remedy to be exclusive, but those cases are of no help to petitioners. In each of

them, there was a controlling federal statute, not simply a judicially-created remedy, especially one like that created in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), which was designed to fill a gap in state and federal law and not to erect a unified federal scheme. Moreover, in those cases the Court recognized that federal statutes were the result of Congress' balancing the rights and obligations of a variety of interested persons involved in the covered occupations and/or locations. But here Congress did not make any similar tradeoffs that would justify a conclusion that federal law should exist to the exclusion of state law. Because Congress has not legislated for deaths of civilians like Natalie Calhoun in territorial waters, states remain free to fashion their own legislative remedies.

Petitioners and their *amici* urge this Court to sacrifice state wrongful death remedies on the altar of uniformity, despite the absence of express congressional authorization. However, absolute uniformity of maritime law has never been the dispositive factor in maritime and other decisions of this Court. Indeed, Congress itself has created disuniformity in the maritime law by, for example, providing different statutory remedies for seamen and civilians killed on the high seas. This Court has been reluctant to displace state law, except where state law alters the primary conduct of actors in regimes in which there are important federal interests at stake. Since Yamaha is already subject to state law for jet ski accidents that occur on inland rivers and lakes, and since the state statutes only prescribe the types of damages that are recoverable, and do not create a different duty of care, state law can readily co-exist with federal maritime law and should not be displaced.

Finally, Congress has never shied away from its obligation to regulate maritime law when it thought it necessary, as it did in the Death on the High Seas Act, the Jones Act, and the Longshore and Harbor Workers' Compensation Act. Moreover, it has established a uniform statute of limitations for *all* maritime torts involving death or

personal injuries, regardless of location. *See* 46 U.S.C. § 763a. If Congress decides that a uniform remedy for deaths in territorial waters is desirable, Congress will create one. But until it does, the existing state remedies should not be swept aside by the courts.[1]

ARGUMENT

I. THE COURT OF APPEALS HAD JURISDICTION OVER THE QUESTION OF WHETHER FEDERAL LAW DISPLACED STATE LAW IN THIS CASE.

In response to the question posed by the Court in granting certiorari, petitioners and their *amici* argue that the court of appeals had jurisdiction under 28 U.S.C. § 1292(b) to address the question of whether federal law displaces state law in this case since that question was decided by the district court and was antecedent to the question identified in the district court's certification order. Because we agree, we will only add a few additional supporting reasons.

The text of section 1292(b) directly supports the conclusion that the jurisdiction of the court of appeals is governed by the order certified, not the question of law identified by the district judge:

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[1]We are at somewhat of a loss to understand why the United States entered this case to support petitioners, especially since Congress has exempted from the Federal Tort Claims Act claims "for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States." 28 U.S.C. § 2680(d). In addition, to our knowledge, the United States does not manufacture or distribute jet skis or other similar products that might give rise to claims such as are involved in this case.

> When a district judge, in making in a civil action *an order* not otherwise appealable under this section, shall be of the opinion that *such order* involves a **controlling question of law** as to which there is substantial ground for difference of opinion and that an immediate appeal from *the order* may materially advance the ultimate termination of the litigation, he shall so state in writing in *such order*. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from *such order*, if application is made to it within ten days after the entry of *the order*... .

28 U.S.C. § 1292(b) (emphasis added). There are six references made to the "order," whereas the phrase, "a controlling question of law," is mentioned only once. The repeated appearance of the word "order" strongly suggests Congress' concern that the order itself be immediately appealable, not that the appeal be confined to a specific question of law identified by the district court.

This interpretation is also supported by examining the rather different language of other interlocutory appeal statutes which are based on certification of specific questions of law. One such statute is 28 U.S.C. § 1254(2) (formerly § 1254(3)), which confers jurisdiction on this Court to review "[b]y certification at any time by a court of appeals of any *question* of law ... as to which instructions are desired" (emphasis added). Other examples include state statutes permitting certification of questions to state courts. *See, e.g.*, D.C. Code § 11-723 (providing that "[t]he District of Columbia Court of Appeals may answer *questions of law* certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, or the highest appellate court of any State..." (emphasis added)); *Zant v. Stephens*, 456 U.S. 410, 416-17 n.4 (1982) (certifying a state law question under Georgia Code § 24-4536 which permits this Court to "certify such *questions* or propositions of the

laws of Georgia to [the Georgia Supreme Court] for instructions concerning such *questions* or propositions" (emphasis added)). Even when there is a certified question of law, this Court has recognized that it may make sense to decide other questions. *See* Sup Ct. Rule 19.2 ("When a question is certified by a United State court of appeals, this Court, on its own motion or that of a party, may consider and decide the entire matter in controversy. See 28 U.S.C. § 1254(2)").

Similarly, the language of § 1292(b) contrasts with Supreme Court Rule 14.1(a), which focuses on the "questions presented" in the petition for certiorari when describing the prudential boundaries of appellate review adopted by this Court: "The statement of any *question* presented is deemed to comprise every subsidiary *question* fairly included therein. Only the *questions* set forth in the petition, or fairly included therein, will be considered by the Court" (emphasis added). Despite that limitation, Rule 24(a) specifically allows this Court to "consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction." Thus, even where the grant of power is question-based, as opposed to order-based, there is leeway to decide other questions when appropriate. And here, where both the district court and the court of appeals have concluded under § 1292(b) that there are good grounds for an exception to the final judgment rule, there is no reason why Congress would have intended to forbid a court of appeals from exercising its discretion to address underlying questions of law that form the basis of the certified order under review.

The Court's decision in *Smith v. Vulcan Iron Works*, 165 U.S. 518 (1897), decided almost 60 years before section 1292(b) was enacted, lends further support to this conclusion. In *Smith*, this Court examined the scope of review under an 1891 statute, which is the predecessor of 28 U.S.C. § 1292(a)(1), authorizing interlocutory appeals from orders granting injunctions. *Id.* at 520. This Court determined that

the plain language of the statute permitted the appeal from the entire order and did not restrict the review in the court of appeals to the part of the order granting or continuing the injunction. *Id.* at 524; *cf. Swint v. Chambers County Comm'n*, 115 S. Ct. 1203, 1211 (1995) (acknowledging that this Court does not categorically require courts of appeals to confine their review to the precise ruling over which they have jurisdiction).[2]

Further support for the decision of the Third Circuit to exercise its discretion to address the displacement issue can be found in a closely analogous practice followed by this Court. In accordance with Rule 14.1(a), this Court has treated "prior" questions of law not explicitly mentioned but "predicate to [the] intelligent resolution" of the lower court's judgment as subsidiary issues "fairly included" in the question on which the Court granted certiorari. *See, e.g., Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961, 965 (1995); *Vance v. Terrazas*, 444 U.S. 252, 258-59 n.5 (1980); *Procunier v. Navarette*, 434 U.S. 555, 559-60 n.6 (1978). In the spirit of Rule 14.1(a), this Court has sensibly held that it has discretion to decide a case on grounds not raised in the petition for certiorari. *See Izumi Seimitsu Kogyo v. United States Philips Corp.*, 114 S. Ct. 425, 428 (1993) (reaffirming such scope of review); *see also Public Citizen v. United States Dept of Justice*, 491 U.S. 440 (1989) (not addressing the constitutional grounds on which district

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[2] Indeed, when the courts of appeals have considered appeals from grants or denials of preliminary injunctions under 28 U.S.C. § 1292(a)(1), they have also reviewed denials of motions to remand to state court, even though such orders are not otherwise appealable. *See, e.g., O'Halloran v. University of Washington*, 856 F.2d 1375, 1378 (9th Cir. 1988); *Beech-Nut v. Warner-Lambert Co.*, 480 F.2d 801, 803 (2d Cir. 1973); *Kysor Indus. Corp. v. Pet, Inc.*, 459 F.2d 1010, 1011 (6th Cir.), *cert. denied*, 409 U.S. 980 (1972); *Mayflower Indus. v. Thor Corp.*, 184 F.2d 537, 538 (3d Cir. 1950), *cert. denied*, 341 U.S. 903 (1951).

court decided case, but affirming ruling on statutory grounds rejected by district court); *Lowe v. Securities and Exchange Comm'n*, 472 U.S. 181 (1985) (declining to reach constitutional question on which certiorari was granted, but deciding the case on statutory grounds not raised in petition). Although in these cases this Court was acting pursuant to the principle that courts should not address constitutional issues if a case can be decided on other grounds, *Lowe*, 472 U.S. at 190, the cases further substantiate the willingness of this Court to grant itself an expansive scope of appellate jurisdiction in the appropriate circumstances. For similar reasons of efficiency and prudence, and in the absence of any indication that Congress intended the discretionary jurisdiction under section 1292(b) to be limited to the precise question identified by the district court, this Court should likewise permit appellate courts to exercise a similarly reasonable scope of jurisdiction under § 1292(b).

Allowing the courts of appeals a reasonable degree of flexibility in exercising their discretionary jurisdiction is necessitated by the structure of § 1292(b) and the appeals process. First, the district court identifies what it concludes are the controlling questions. If that determination is the limit of appellate jurisdiction, § 1292(b) is a very narrow grant of authority. That result would be particularly surprising since § 1292(b) itself does not even require the district court to include the controlling question of law in its certification order.

Second, interlocutory review under § 1292(b) generally involves two different sets of judges, one granting leave for appeal and another conducting the actual review. *See, e.g.*, 3rd Cir., Internal Operating Procedures 10.1-10.3. Typically, a motions panel passes on petitions for § 1292(b) review, which must be filed within ten days of the district court's certification order. Not surprisingly, the motions panel does not delve deeply into the merits at this stage; in this case, review was granted within 25 days of the certification order by the district court. However, once

review is granted, the appeal is referred to a merits panel, and the parties submit full briefs from which the court can properly dispose of the appeal.

In light of the expedited manner of accepting petitions for immediate appeal, limiting the scope of appellate review would unduly penalize the parties and the merits panel where the district court or the motions panel failed to identify the proper pivotal question of law. The problem is likely to surface only after the merits panel has had an opportunity to become better informed about a case, following the submission of the briefs. At that point the panel would either have to dismiss the appeal, or perhaps send it back for recertification of another question of law.

In concluding that the Third Circuit properly reached the displacement question in this case, respondents are not asking this Court to create or expand an exception to the final judgment rule, as was urged in *Swint*, *supra*, and *Johnson v. Jones*, 115 S. Ct. 2151 (1995). Unlike both of those cases, the Third Circuit already had jurisdiction here to review the district court's interlocutory order under § 1292(b). Thus, permitting the court of appeals to decide the displacement issue would not obstruct the resolution of this case in the trial court, since that court itself had certified that "an immediate appeal would materially advance the ultimate termination of litigation," as § 1292(b) requires. To the contrary, deciding whether federal or state law applied in this case will achieve the purpose sought by § 1292(b): to allow appeals courts to decide controlling questions of law, thereby conserving time and resources for courts and litigants alike.

Since neither the language of § 1292(b) nor general principles of appellate review preclude courts of appeals from exercising jurisdiction over an antecedent question of law that forms the basis of the certified order, the court of appeals had jurisdiction to decide the issue of whether state or federal law governed this case. As we now demonstrate, the court

properly concluded that federal maritime law did not displace the state laws on which respondents relied.

II. THE COURT OF APPEALS CORRECTLY HELD THAT MARITIME LAW DOES NOT DISPLACE STATE LAW IN THIS CASE.

The principal argument in support of displacing state law in this wrongful death case assumes that this Court has adopted a general rule that federal maritime law leaves no room for the application of state law in the territorial waters of the United States. But petitioners and their *amici* fail to recognize that, in each of the cases on which their argument rests, this Court has identified one or two special factors that mandated federal supremacy. Indeed, far from prescribing a general rule of displacement, this Court has repeatedly observed that state law may apply to maritime torts unless certain factors are present which require that state law be displaced. At the outset, therefore, we review the relevant factors that need to be examined in each case in deciding which law to apply to the tort alleged. We then review the prior case law and statutes that bear on the issue presented and apply their teachings to this case. Finally, we point out the many policy reasons which counsel against adopting the displacement theory offered by petitioners and the United States.[3]

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[3]At several places in their brief, petitioners frame the issue as whether the general maritime law "applies" to this case (Br. 10, 11), or whether admiralty jurisdiction "extends to recreational boating" (Br. 11). Respondents do not argue that those seeking compensation for deaths such as that which occurred here are foreclosed from relying on general maritime law, although the issue is by no means clear. *See infra* at 32-34. The only issue here is whether general maritime law is the *only* law on which respondents may base their claims because that law has displaced all state laws dealing with deaths in territorial waters.

A. *The Relevant Factors*

The arguments made in support of displacement are not based on any federal statute, but on cases of this Court, many of which actually create, rather than displace, causes of actions for wrongful death. In addition, petitioners and their *amici* rely on many of those cases for what they say, rather than what they hold. As we show in part B, their principal authorities are all distinguishable because of the presence (or absence) of one or more factors which have determined the outcome in each instance. To guide the Court in considering those cases, we list below the relevant factors to examine before deciding whether a case is comparable to this one. Most significantly, and unlike any other case decided by this Court, this case involves the death of a civilian caused by someone other than the victim's employer, and it occurred in territorial waters, where there is no federal statute that creates a remedy for any person who is not a maritime employee.

- Location of accident/wrongdoing — high seas, territorial (navigable) waters of the United States, inland waters, or land.
- Status of victim — seaman, longshore worker, or civilian, which includes persons engaged in recreation in or on the water, as well as non-maritime workers and guests who are aboard a vessel.
- Identity of defendant — the employer, the owner of a vessel, or a non-maritime (civilian) entity, including land-based entities such as petitioners.
- Nature of claim — personal injury, wrongful death, or survivorship.
- Basis of liability — negligence, unseaworthiness, absolute liability, or negligence without a contributory negligence bar.

• Law relied on — general maritime law, the Death on the High Seas Act, the Jones Act, the Longshore & Harbor Workers' Compensation Act, or state law.

• Items of damages sought — medical expenses, earnings (past/future), funeral expenses, pain and suffering, loss of society (consortium) — with the major subdivisions being pecuniary and non-pecuniary losses.

Although not all of these factors are involved in each of the cited cases, usually one or two of them is ultimately dispositive to both the holding of the Court, and, importantly, to the precise limits of the Court's decision. As the following discussion demonstrates, this Court has found displacement of state law primarily where Congress has enacted directly-applicable legislation, and it has never adopted a general rule favoring displacement of state law, especially where claims for wrongful death are involved.

B. *The Relevant Decisions and Statutes.*

This saga of the sea begins with the decision of this Court in *The Harrisburg*, 119 U.S. 199 (1886), where a seaman was killed when his ship collided with another vessel in coastal waters off Massachusetts. His heirs brought suit against the offending vessel for wrongful death, relying on the general maritime law. This Court rejected the plaintiffs' claim on the grounds that, absent a statute, there was no such action as wrongful death at common law, and it refused to create one in the maritime setting either. *Id.* at 213. Since the Calhouns are relying on state law for their wrongful death claim, it is particularly significant that a similar state law claim in *The Harrisburg* was foreclosed only because the heirs had allowed the state statute of limitations to expire. However, the opinion makes clear that the state law action would have been available had it been timely filed. *Id.* at 214.

Almost 85 years later in *Moragne v. State Marine Lines, Inc.*, 398 U.S. 375 (1970), this Court overruled *The Harrisburg* and recognized a general maritime wrongful death cause of action under federal common law. In a lengthy, careful, and unanimous opinion by Justice Harlan, the Court reviewed both the basis of *The Harrisburg* decision itself, which it found generally lacking in persuasiveness, and the various federal statutes that Congress had passed in the interim, in particular the Death on the High Seas Act, 41 Stat. 537 (1920), codified at 46 U.S.C. §§ 761; the Jones Act, which was originally passed as 38 Stat. 1185 (1915), was amended on several occasions, and is now codified at 46 U.S.C. App. §§ 688; and the Longshore and Harbor Workers' Compensation Act ("LHWCA"), which was first passed in 1927, 44 Stat. 1424, and is now codified at 33 U.S.C. §§ 901.

The accident in *Moragne* involved a longshoreman who was working aboard a vessel in the territorial waters of Florida, and his death resulted in a suit against the owner of the vessel. The Court overruled *The Harrisburg* and held that his heirs had a right to recover under the general maritime law of unseaworthiness. Before explaining how the Court arrived at that position, it is important to note that the plaintiffs in *Moragne* had a pending wrongful death claim under Florida law based on negligence. However, since Florida law did not allow claims based on unseaworthiness — which imposes "an absolute duty not satisfied by due diligence," *Moragne*, 398 U.S. at 399 — such a claim could only be advanced under the general maritime law. Indeed, the motion to dismiss made by the vessel owner and the employer of the decedent solely attacked the claim of unseaworthiness, and left intact the state wrongful death claims based on negligence, similar to those advanced by respondents here. Thus, there was no dispute that plaintiffs' state law claim was valid, and the only question was whether an additional remedy was available under general maritime law based on the doctrine of unseaworthiness. *Id.* at 377.

The Court ultimately rested its decision in *Moragne* on Congress' enactment of various federal statutes which, in the Court's view, compelled a different result from *The Harrisburg* because they evidenced a strong public policy that maritime deaths should not go uncompensated. The Court acknowledged that the passage of the legislation might suggest limiting non-statutory maritime remedies, *i.e.*, the federal statutes might evidence a congressional intent to preclude other wrongful death actions not specified in the statutes. *Id.* at 392-93. After reviewing both the statutes and their legislative history, however, the Court rejected that view and concluded that, while those statutes were limited to the circumstances set forth therein, they were all directed at compensating persons who had been killed or injured in maritime accidents, and therefore did not preclude judicially-created remedies in other circumstances. *Id.* at 393-402.

In his opinion, Justice Harlan made multiple references to the continued availability of state law remedies that would exist concurrently with the remedy which the Court recognized in that case for unseaworthiness under the general maritime law for deaths occurring in territorial (navigable) waters. *See, e.g., id.* at 393, 395-97, 398, 399-400, 401 n.15, 408. *See also Romero v. International Terminal Operating Co.*, 358 U.S. 354, 372-76 (1959)(detailing extensive role of state law in maritime matters, including wrongful death remedies). Thus, while *Moragne* created a maritime cause of action for wrongful death in territorial waters, there is nothing in the opinion to suggest that the Court intended to eradicate prior existing remedies under state law.[4]

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[4]The discussion at 398 U.S. at 400-01 regarding uniformity could be read to support petitioners, except that footnote 15, which comes in the middle of that discussion and specifically refers to the availability of state remedies in *The Harrisburg*, makes it clear that

(continued...)

Indeed, the Court expressly acknowledged that, even after DOHSA was enacted, "state remedies in territorial waters were not disturbed [which] ensured that Congress' solution of one problem would not create another by inviting the courts to find that the Act pre-empted the entire field, destroying the state remedies that had previously existed." *Id.* at 398. Under this Court's standard preemption analysis, it is the intent of the entity creating the scheme allegedly causing the preemption — usually Congress, sometimes a regulatory agency, but here this Court in *Moragne* — that is the touchstone of preemption analysis. *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992). Because nothing in *Moragne* suggests that this Court intended, in the course of creating a new federal maritime remedy in wrongful death cases based on claims of unseaworthiness, to eradicate the long-standing state remedies allowing recovery in cases of wrongful death, there is no basis for a finding of preemption, or, in nautical terms, displacement.

Among the cases that this Court has decided since *Moragne* on the general topic of recoveries for wrongful death in territorial waters or on the high seas, the three on which petitioners and their *amici* place greatest reliance are *Off-Shore Logistics, Inc., v. Tallentire*, 477 U.S. 207 (1986), *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), and *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). Properly read, however, those cases are readily distinguishable, based on both the factors outlined above and the policies underlying their holdings.

In *Tallentire*, two workers on an oil platform 35 miles off the Louisiana coast were killed when the helicopter transporting them to their work site crashed on the high seas. Invoking Louisiana's wrongful death statute, the decedents'

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[4](...continued)
there was no intent by the *Moragne* Court to abolish state law remedies.

wives sought to recover non-pecuniary damages, such as loss of service and society, in addition to the pecuniary damages recoverable under DOHSA. This Court held that DOHSA, including all of its terms and conditions, covered all deaths occurring on the high seas and that it precluded the application of any state statute for any death on the high seas.

Petitioners read *Tallentire* far too broadly by attempting to extend the Court's analysis to a general preclusion of all state wrongful death statutes for maritime torts, regardless of the location of the accident. In so doing, however, petitioners ignore three crucial pillars of the analysis in *Tallentire* that not only distinguish *Tallentire* from this case, but support the position that a general maritime remedy does not displace all state remedial statutes. First, this Court based its decision on the fact that a statute (there DOHSA), enacted by Congress, expressly created a remedy for the very injury on which the lawsuit was based. This case, by contrast, involves no federal statute; Congress has decided not to provide an express remedy for an injury or death of a civilian in territorial waters. Therefore, the application of state law remedies here would do nothing to thwart congressional objectives.

Second, the majority opinion makes clear that state laws continue to apply to deaths of non-seamen in territorial waters. *Tallentire*, 477 U.S. at 221, 225. The Court held that the first sentence of the broad savings clause contained in section 7 of DOHSA, 46 U.S.C. § 767, which provides that "the provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter," did not permit the application of state wrongful death statutes to deaths on the high seas. However, the Court concluded that the clause did not forbid all non-DOHSA wrongful death remedies since section 7 was also intended to ensure that "state courts enjoyed the right to entertain causes of action and provide wrongful death remedies both for accidents arising on territorial waters and,

under DOHSA, for accidents occurring more than one marine league from shore." *Id.* at 221. In fact, the Court specifically noted that, when DOHSA was enacted, "[i]t had been recognized that states could 'modify' or 'supplement' the federal maritime law by providing a wrongful death remedy enforceable in admiralty for accidents on territorial waters." *Id.* at 224. Moreover, as the *Tallentire* majority recognized, the second sentence of section 7 — which makes DOHSA inapplicable "to the Great Lakes or to any water within the territorial limits of any State" — directly supports respondents. *Id.* at 227 (savings clause "did not implicitly sanction the operation of state wrongful death statutes on the high seas in the same manner as the savings clause did in territorial waters"). And since the dissenters would have read the savings clause to apply to all wrongful death cases, even those occurring on the high seas, the conclusion that at least the second sentence in section 7 saved state wrongful death claims in state territorial waters was unanimous.

Even if the savings clause in DOHSA did not save state law remedies in territorial waters, that omission would hardly aid petitioners since DOHSA provides a cause of action only for deaths on the high seas, not for deaths in territorial waters. Hence, the statute need not "save" anything because there is no generally applicable federal remedy for deaths where Natalie Calhoun was killed. Thus, in displacing state remedies for wrongful death, the *Tallentire* Court limited its decision to the high seas — the "area where the federal interests are primary." *Id.* at 233. *See also id.* at 224-25 ("[b]ecause DOHSA by its terms extended only to the high seas, and therefore was thought not to displace these state remedies on territorial waters, § 7, as originally proposed, ensured that the Act saved to survivors of those killed on territorial waters the ability to pursue a state wrongful death remedy in state court")(citation omitted).

Third, regardless of how one reads the savings clause in DOHSA, the Court in *Tallentire* provided a substantial, independent policy rationale for making remedies under that

statute exclusive for deaths that occur outside the three mile territorial limit. The Court observed that DOHSA limits the class of beneficiaries ("wife, husband, parent, child, or dependent"), the time within which the action may be brought (three year statute of limitations), the available damages to pecuniary losses, while at the same time eliminating contributory negligence as a bar. *Id.* at 215. Thus, *Tallentire* should not be read simply as calling for uniformity of damages in the federal system, but as a judicial recognition that the comprehensive scheme created by Congress emerged from a balancing of the interested persons — victims, employers, shipowners, families, and others — who are concerned about deaths on the high seas, a balance that the courts should not disturb.

Once again, Congress has struck no comparable balance here since it has not created a federal maritime remedy for deaths occurring in territorial waters. Accordingly, for these reasons, *Tallentire* has no bearing on the outcome of this case, except to the extent that it highlighted this Court's prior explicit recognition of the continued viability of state wrongful death statutes in territorial waters — a recognition that supports the Calhouns, not petitioners.

These considerations are similarly evident in *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), a case also arising under DOHSA. There, the heirs of a longshoreman killed in a helicopter crash 100 miles at sea attempted to use general maritime law to recover damages for loss of society, which are unavailable under DOHSA. This Court rejected that effort since "Congress has struck the balance for us" among all competing policy considerations that define the statute's priorities and limit its scope. *Id.* at 623. Here, however, the Court is not confronted with a similar congressional command since no federal statute prescribes remedies available to civilians for deaths in territorial waters. *See id.* at 626 (Marshall and Blackmun, JJ., dissenting: recovery "turn[s] solely on a ship's distance from shore at the time of the injury causing death"). Thus, *Higginbotham*

is a variation on *Tallentire*; both refuse to alter express congressional limitations on recoveries for accidents on the high seas, in favor of either the general maritime law or a state statute.

The other case on which petitioners and their *amici* place great reliance, *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), is also irrelevant to a determination of whether state law should be displaced by general maritime law. In *Miles*, as in *Tallentire*, Congress had spoken on the issue before the Court, and the only remaining question was whether other, different remedies continued to be available. The decedent in *Miles* was a seaman, an occupational status explicitly covered by the Jones Act, who was killed on a vessel docked in territorial waters. The suit included a negligence claim under the Jones Act and a *Moragne* claim based on the vessel's unseaworthiness. In addition, to pecuniary damages available under the Jones Act, the complaint asked for non-pecuniary damages under *Moragne*, as supplemented by *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974). As the Court had done earlier in *Tallentire* and *Higginbotham*, it denied the broader recovery, holding that the Jones Act was the exclusive basis for determining the measure of damages for seamen, regardless of whether the death occurred on the high seas or in territorial waters. Once again, since Natalie Calhoun was not a seaman, the Jones Act is inapplicable, as is the exclusivity rationale relied on in *Miles*.

Like *Tallentire*, the *Miles* Court based its analysis on deference to congressionally-expressed policy determinations. Of particular significance was its recognition that, even though the conduct at issue was specifically covered by the Jones Act, the claim based on general maritime law, which provided the applicable standard of conduct, was *not* displaced and that a claim for unseaworthiness survived, even for a seaman covered by the Jones Act. *Id.* at 30. However, the Court limited the type of recovery to pecuniary losses, which is what the Jones Act provides, finding that

Congress intended those damages to be the exclusive types recoverable. *Id.* at 36 ("We will not create, under our admiralty powers, a remedy . . . that goes well beyond the limits of Congress' ordered system of recovery for seamen's injury and death"). Since the Jones Act does not apply here, there is no reason to believe that the general maritime law alone would displace state law remedies for wrongful death.

Indeed, in *Miles* itself, the Court recognized that, when "Congress passed the Jones Act and DOHSA, federal courts uniformly applied state wrongful death statutes for deaths occurring in state territorial waters." *Id.* at 24. The Court went on to observe that "Congress did not extend DOHSA to territorial waters because it believed state statutes sufficient in those areas." *Id.* at 25 (citing *Moragne*, 398 U.S. at 397-98). *See also Miles*, 498 U.S. at 34 (noting that state survival statutes had been specifically recognized by the Court as being preserved when the remedy in *Moragne* was created); Charles A. Wright, *et al.*, *Federal Practice and Procedure* § 3672 at 359 (Supp. 1995) (concluding that, although DOHSA limits the recovery available for persons killed on the high seas, "if the same accident occurs within a marine league from shore where [DOHSA] has no effect, the survivors can recover damages under the state wrongful death statute, including, when provided, reimbursement for non-economic losses").

From these and other cases, certain propositions become clear. First, the Death on the High Seas Act provides the exclusive measure of recovery for any death beyond the three mile limit, except for seamen whose remedies are governed by the Jones Act. Since the accident here occurred within territorial waters, DOHSA is irrelevant to respondents' claims.

Second, statutes that create rights based on a person's status, such as the Jones Act (seamen) or the Longshore and Harbor Worker's Act (longshore workers), provide the exclusive measure of damages for a person in that

occupational status. Nonetheless, under *Miles*, seamen may still rely on the general maritime doctrine of unseaworthiness to establish liability (longshoremen no longer can because of the specific statutory exclusion in 33 U.S.C. § 905(b)), but they cannot obtain damages for wrongful death in excess of those provided in the statute, whether on the high seas or in territorial waters, or, in the case of longshoremen, on land. The rationale for these decisions is that Congress has spoken on the remedies available to individuals in these occupations, and that the level of compensation has been provided in exchange for a complicated set of rights and benefits. Since Natalie Calhoun, age 12, was not employed in any capacity, let alone as a seaman or a longshoreman, those statutes do not apply to her. Because Congress has never addressed the type of benefits that a civilian killed in territorial waters should receive, states remain free to fashion their own legislative remedies.

Third, the viability of state law was recognized both in and before *The Harrisburg*, in *Moragne*, and in all of the principal cases since then, including *Higginbotham*, *Tallentire*, and *Miles*. No case of this Court has held that state law does not apply, except with respect to those situations in which Congress has explicitly legislated for a location (DOHSA) or based on the status of the individual (Jones Act or LHWCA).

Despite the protestations of petitioners and the United States, the basic message of *Moragne* was not to displace other laws, but to be generous with maritime remedies. This Court overruled *The Harrisburg* because it was concerned that there were inadequate remedies for deaths in territorial waters, not because there were too many remedies or state law was interfering with federal maritime law. It is important to recall that the Court could have said in *Moragne* that *The Harrisburg* was the law when Congress passed the Death on the High Seas Act, the Jones Act, and the Longshore and Harbor Workers' Compensation Act, and that, by choosing *not* to extend remedies to territorial waters

in those statutes, Congress intended to preclude the courts from doing so also. This Court rejected that rationale, and instead adopted the generous policies of those statutes and expanded them to provide a cause of action under general maritime law for a death occurring in territorial waters. That policy of generosity cannot be reconciled with petitioners' plea for a finding of displacement here.

The argument against displacement of state laws in this situation is especially strong since there is no federal statute on point. Indeed, the Court went so far as to say in *Miles* that, even though the Jones Act applied, the "general maritime cause of action for the wrongful death of a seaman" in territorial waters still survives, 498 U.S. at 30, although it did limit the types of damages available. And where this Court has found exclusivity, it has done so only where there was a congressional determination in a specifically-applicable statute, either because of location — on the high seas — or status — seaman or longshoreman. It is only in those circumstances that the Court has limited otherwise available federal or state remedies. Since there is no federal statute covering death in territorial waters or that applies to civilians, let alone one that applies to both, there is no basis to displace state law.

Moreover, in the non-maritime context, there is a strong presumption against preempting state laws. *See Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 716 (1985) (refusing to preempt state regulations, despite comprehensive federal regulation, because states are entitled to identify additional regulatory needs and impose further requirements). Even when there is a federal statute related to the cause of action, courts must construe the federal statute in a way that avoids conflict, and thus preemption, of a state rule. *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989) (Sherman Act does not preclude additional remedies under state antitrust law). This presumption in favor of preserving elements of state policy has been incorporated into the admiralty law by requiring a

"clear conflict" before a federal rule will preempt a state rule. *Askew v. American Waterways Operators*, 411 U.S. 325, 342 (1973). *See also Kelly v. Washington*, 302 U.S. 1, 15 (1937) (preserving state action for unseaworthiness); *Huron Cement Co. v. Detroit*, 362 U.S. 440, 442 (1960) (upholding anti-pollution ordinance in navigable waters). Here, because there is not even a federal statute that the courts must narrowly construe, the general maritime law cannot destroy the presumption against preemption that is accorded state remedial statutes.

As this Court recognized in an analogous context, those who seek to displace state law and to "create a special federal rule" must satisfy "a heavy burden," especially in the absence of a significant conflict with a federal statute. *O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048, 2053, 2055 (1994). Not only is there no strong federal statutory policy that would warrant the displacement of state law, but, as we now show, there are many reasons why federal law should not be applied here.

C. *There Are Many Reasons Not to Displace State Law.*

At the outset, it is necessary to be clear about what would be displaced, and what would not, if petitioners' views were accepted. According to petitioners, they seek the applicability of general maritime law, with whatever limits on damages there may be, to all cases of wrongful death in the territorial waters of the United States. If such a claim exists in this situation under general maritime law (*but see infra* at 32-34), it would be based not simply on negligence, but also on unseaworthiness, although the precise terms and conditions on which such an action would be maintained were left open in *Moragne*, 398 U.S. at 406-07. But whatever conditions may apply, there can be no doubt here that the parents of Natalie Calhoun would be entitled to be plaintiffs in any action under the general maritime law.

Nonetheless, the wholesale and exclusive use of federal maritime law would create substantial problems that further counsel against displacement.

1. Preserving State Wrongful Death Remedies Will Not Affect the Primary Conduct of Jet Ski Manufacturers.

To determine if state law should be displaced, this Court has asked whether a uniform federal standard is necessary in order to govern primary conduct. Thus, in *American Dredging Co. v. Miller*, 114 S. Ct. 981 (1994), this Court rejected a claim that the interests of uniformity required a state court to follow federal *forum non-conveniens* rules in a Jones Act case. Instead, the Court concluded that the state rule was procedural and not one "upon which maritime actors rely in making decisions about primary conduct — how to manage their business and what precautions to take." *Id.* at 987, 988-89. Likewise, in *O'Melveny & Myers*, the Court rejected the argument for a uniform federal standard governing the conduct at issue there because the primary conduct did not involve that of the United States or its agents. 114 S. Ct. at 2055; *see also id.* (warning that assertion of uniformity alone may prove too much).

Examining the issue of primary conduct in this case makes it clear that the rationale for uniformity is inapplicable here. Surely, the application of Pennsylvania's wrongful death remedy in this case will have no effect on the primary conduct of any seaman, longshoreman, or employer. Nor can the owner of a vessel argue that its primary conduct would be affected by the rule here since the "vessel" here is not owned by petitioners, although they did design and manufacture it.

More fundamentally, focusing the displacement inquiry on the effect that a state wrongful death statute will have on primary conduct makes it clear, for several reasons, that a

ruling supporting petitioners would have a negligible, if any, impact on the basic operations of jet ski manufacturers. First, jet skis are heavily used on inland waters in Pennsylvania and elsewhere. Since inland lakes are not territorial waters, state law, not *Moragne*, would cover all of the elements of a jet ski accident there, whether it resulted in death or personal injuries. Thus, petitioners now have to comply with whatever standard of conduct the laws of 50 states generally require, since it is impossible for them to know where a particular jet ski might ultimately be utilized.

Indeed, the description of petitioners' business activities in their brief reveals that they also manufacture "motorcycles, snowmobiles, generators, scooters, all-terrain vehicles, personal watercraft, outboard motors and golf cars." Br. at ii. Therefore, to the extent that the problems that caused the death of Natalie Calhoun on territorial waters are similar to those that might occur for petitioners' other products on land or on water (inside a state's borders), there will be no uniformity unless federal and state law happen to coincide.

Second, most jet ski accidents do not result in death, but injuries — some serious and some not. Despite the assertions of petitioner and their *amici*, it is *not* settled that state personal injury law would be displaced in any case not involving death. *See infra* at 31-32. Hence petitioners' primary conduct, and the need to maintain appropriate insurance or self-insurance to protect against tort claims, would be the same regardless of the outcome in this case. That is true because it is impossible to predict whether faulty manufacturing and/or design would result in death or "merely" serious injury, which would probably be subject to state law, wherever the accident occurred.

2. Uniformity is Not a Dispositive Consideration in Admiralty Displacement Analysis.

With respect to the much vaunted concerns about uniformity, this Court has ruled that, standing alone, they are never dispositive. *See American Dredging*, 114 S. Ct. at 987 ("The requirement of uniformity is not, however, absolute"); *Mobil Oil*, 436 U.S. at 624 (uniformity not an overriding consideration); *see also O'Melveny*, 114 S. Ct. at 2055. In fact, there are many other instances of disuniformity already tolerated in the federal maritime law. For example, in *Miles*, the Court determined that survivors of seamen were not entitled to loss of society damages, at the same that it acknowledged that state wrongful death remedies, including loss of society, would be available to non-seamen in territorial waters. 498 U.S. at 30-32. Thus, uniformity did not overcome congressionally-mandated differences based on occupational status.

Further evidence that Congress has not adopted uniformity as a beacon to be followed invariably is found in federal statutes that expressly legislate disuniformity in more closely related situations than is the death of Natalie Calhoun to the typical maritime worker's demise. Thus, while a seaman's heirs are entitled to both survival damages and wrongful death damages under the Jones Act for deaths occurring on the high seas, DOHSA expressly limits non-seamen to only wrongful death damages. A similar disuniformity exists regarding the basis of liability. If a seaman and non-seaman were both killed in territorial waters due to an unseaworthy but non-negligently maintained vessel, only the seaman would recover for unseaworthiness under the general maritime law, since there is generally no unseaworthiness cause of action available to civilians. *See Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959). Finally, as *Moragne* itself recognized, even when Congress has created statutory remedies for wrongful

deaths, "each of these provisions differs slightly in the naming of dependent relatives who may recover and in the priority given to their claims." 398 U.S. at 406-07.

The fact that there are different measures of damages, different persons who are entitled to sue for wrongful death, and perhaps different standards of liability under federal and state law, are all functions of our federal system with which we have lived for more than 200 years. If Congress believes that uniformity is sufficiently important, there is no doubt that it has the power to act, just as it did in the Death on the High Seas Act. Indeed, in 1980 Congress imposed a uniform statute of limitations period for all maritime torts, federal or state, regardless of where they occur. 46 U.S.C. § 763a. *See, e.g., Francis v. Forest Oil Corp*, 628 F. Supp. 836, (W.D.La.), *appeal dismissed,* 798 F.2d 147 (5th Cir. 1986)(federal statute's three year limit trumps one year Louisiana period). The predecessor statute of limitations provision, 46 U.S.C. § 762, now repealed, applied only to deaths and only to those on the high seas. Congress, not the federal courts, decided that uniformity was desirable, and imposed it, but only regarding the time within which an action must be brought. Until Congress has expressly legislated uniformity for the type of damages available from deaths in territorial waters, for persons who are not maritime workers, Natalie Calhoun's heirs are entitled to bring this wrongful death case relying on state law if they so choose.[5]

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[5]Although reliance on state law is generally beneficial to claimants, in some situations claimants obtain benefits under state law in exchange for surrender of other rights, in which case it is the defendant that would gain from the plaintiff's use of state law remedies. See *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990) (for land-based employee injured while on boat transporting him to a job on island, state workers compensation benefits held to be exclusive remedy, and general maritime law is inapplicable).

To support displacing state law on the supposed need for uniformity, the United States cites several cases which, it asserts, stand for the proposition that federal law is exclusive within the admiralty jurisdiction (Br. 15-17). We have already established that *Moragne* and other wrongful death cases specifically recognized state claims as co-existing with federal law, except where Congress has otherwise preempted the field, as it did in DOHSA and the Jones Act. The cases the United States relies on, with the exception of the long-questioned decision in *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), do not hold that federal law always applies to claims for personal injuries arising in territorial waters. Properly read, these cases merely reject the use of state law in the circumstances presented there because its application would have undermined federally-created rights.

Thus, in *Pope & Talbott, Inc. v. Hawn*, 346 U.S. 406, 408-09 (1953), state common law was held not to apply to a claim of unseaworthiness because "the harsh rule of the common law under which contributory negligence wholly barred an injured person from recovery is completely incompatible with modern admiralty policy and practice." In *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630 (1959), the Court refused to import New York common law concepts into the general maritime law because the two jurisdictions imposed different standards of care, and the use of state law would incorporate "inappropriate common law concepts" into maritime law. And in *Panama R.R. v. Johnson*, 264 U.S. 375 (1924), the Court held that only the Jones Act, not state law, governs a seaman's suit against his employer.

Even in *Jensen*, where the Court rejected the application of a state law that would have favored the longshoreman-victim, it did so because the state law would have had the effect of altering substantive federal maritime law. But *Jensen* does not stand for the proposition that a state law which merely supplements federal law must be

displaced; state law affecting maritime commerce is invalid only "if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law." 244 U.S. at 216. Assuming that even the limited displacement of state law in *Jensen* is still good law (*see e.g.*, *American Dredging*, 114 S. Ct. at 985 n.1; *id.* at 990 (Stevens, J. concurring)), it hardly supports the result urged by petitioners, nor is its application required here in order to sustain any federal maritime policy. Indeed, as this Court observed in *The Tungus v. Skovgaard*, 358 U.S. 588, 594 (1959), "[t]here is no merit to the contention that the application of state law to determine rights arising from death in state territorial waters is destructive of the uniformity of federal maritime law. Even *Southern P. Co. v. Jensen*, which fathered the 'uniformity' concept, recognized that uniformity is not offended by 'the right given to recover in death cases.' 244 U.S. 205, at 216." Since, as we have demonstrated above, nothing in *Moragne* was intended to displace the long-standing practice of recognizing state law wrongful death claims, pleading for uniformity does not supply the missing ingredient needed for a finding of displacement.

3. Imposing the General Maritime Law Would Further Complicate Maritime Tort Litigation.

It is important to note that, if petitioners' theory were adopted, the general maritime law would not only limit the amount of recovery for deaths in territorial waters, but it would also import unseaworthiness as a basis of recovery for any arguably maritime claim; if it did not create a uniform basis for judging primary conduct, the vital need for uniformity on which petitioners rely so heavily would disappear.

Although this Court has never decided whether an injury caused by a jet ski or even a jet skier can be based on a claim of unseaworthiness, it is clear that not every maritime claim can rely on that doctrine as a basis for recovery. Thus, in *Kermarec*, *supra*, 358 U.S. at 629, this Court ruled that unseaworthiness was not available to an invitee aboard a vessel docked in port, a far more likely candidate for applying the doctrine than is this case. Indeed, since the duty to maintain a seaworthy vessel is that of the owner, and since neither petitioner owned the jet ski on which Natalie Calhoun was riding, there are further reasons to doubt that wrong committed by petitioners was a maritime tort. Since there is at least a strong argument that respondents' claims here cannot be based on unseaworthiness, and since that was the basis for the claim in *Moragne*, there is no basis for a non-existent federal claim to displace existing state law remedies.

An unseaworthiness cause of action might make sense for the death of a passenger on a vessel in territorial waters, but it is difficult to envision how it would apply to the jet ski manufacturer in this case. A major difficulty in applying the concept of unseaworthiness here is that the wrongful conduct on which respondents' complaint is based did not occur on or near territorial waters, but on land, at the time of the design or manufacture of the jet-ski. Indeed, it is purely happenstance that the death from this jet-ski occurred on the navigable waters, rather than on an inland lake, or perhaps even on dry land if the specific cause of the malfunction of the jet ski was also found on petitioners' land-based craft, such as a snowmobile. Therefore, adopting the theory advanced by petitioners and the United States would create precisely the kind of "dissatisfaction" described by the United States in note 9, page 17 of its brief, by applying "peculiarly maritime duties, such as that of unseaworthiness" to the design and manufacturing activities that are involved in this case and that have virtually nothing to do with the law of the sea.

Indeed, it is arguable that the tort here is not a maritime tort at all. As this Court recognized in a series of cases, all torts occurring on or over the water are not automatically maritime wrongs. *See Sisson v. Ruby*, 497 U.S. 358 (1990). To come under admiralty jurisdiction, the harm still must bear a substantial relationship to seagoing activities. *See also Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 115 S. Ct. 1043 (1995). If this Court were to rule that general maritime law displaces all state law, the scope of its decision would presumably be limited to those cases that involve a genuine maritime tort. *See Freightliner Corp. v. Myrick*, 115 S. Ct. 1483, 1487 (1995) (no preemption when there is no federal law to replace state claim). Therefore, in every case that is only *arguably* maritime, the courts would first have to determine if the action is *in fact* maritime before it could apply federal law. Yet, if the Court follows its current admiralty jurisprudence, under which federal maritime law coexists with, but does not displace, state law, *see Part B supra*, it will not have to confront the question, here or in other cases, of whether the tort at issue is sufficiently related to seagoing activity to be the subject of maritime law. In sum, a rule requiring displacement will inevitably require an additional and sometimes complex, and often unnecessary, inquiry into the character of the tort at issue.

Finally, one of the arguments made in *Moragne* against the creation of a maritime remedy for wrongful death in territorial waters was that it would require the courts to decide who could bring such actions, what damages were available, what statutes of limitations to apply, and how to deal with all of the other problems that are usually decided by state law, or by federal statutes where Congress has acted. Unlike the situation in *Moragne*, where federal law supplemented state law, if the Court were to hold that the *Moragne* remedy displaces state law, the courts will have to address those questions in every case, except for the statute of limitations issue, which Congress has answered by 46

U.S.C. § 763a. By contrast, when the only issue is whether there is an additional right created under general maritime law, there is generally no need to decide many of these questions.

* * * *

Despite the lengthy briefs of petitioners and their *amici*, it is difficult to discern any rationale for finding displacement, other than a reflexive call for uniformity. But that is a plea that should be directed to Congress, not this Court. There is no federal statute applicable to civilians who are either injured or killed in territorial waters, or in accidents involving essentially land-based design and manufacturing activities, such as those engaged in by petitioners here. Given the strong reluctance of this Court to displace state law, the interests of states in protecting their waterways, and the generosity toward state remedies exhibited in *Moragne*, there is, we submit, no reason for concluding that the long established right of the states to create wrongful death and survivorship remedies for persons injured and killed in accidents on their territorial waters has been somehow silently and secretly expunged by Congress or this Court. It may be that a uniform federal law regarding death on territorial waters would make sense, but that determination is for Congress, just as it was for Congress to both create and limit remedies for deaths on the high seas and for claims by seamen and longshoremen, and to create a uniform statute of limitations for all maritime torts.

CONCLUSION

For all of these reasons, the court of appeals correctly held that the district court erred in holding that state law was displaced in this case by the general maritime law. Accordingly, the judgment of the court of appeals should be affirmed, and the case remanded to the district court to decide respondents' state law claims.

Respectfully Submitted

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September 15, 1995

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*Counsel wishes to acknowledge the substantial assistance provided by Baher Azmy, New York University Law School, Class of 1996, and Su Sie Ju, University of Virginia Law School, Class of 1997.

Supreme Court, U.S.
FILED
OCT 10 1995
OFFICE OF THE CLERK

No. 94-1387

In The

Supreme Court of the United States

October Term, 1995

YAMAHA MOTOR CORPORATION, U.S.A. and
YAMAHA MOTOR COMPANY, LTD.,

Petitioners,

v.

LUCIEN B. CALHOUN and ROBIN L. CALHOUN,
Individually and as Administrators of the
Estate of Natalie K. Calhoun, Deceased,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. By Seeking To Limit *Moragne* To Its Facts, Respondents Ignore Both The Rule Of That Case And The Principle It Was Intended To Advance 2

II. Respondents Would Have This Court Apply Land-Based Preemption Methodology Rather Than The Admiralty Displacement Scheme Outlined In *American Dredging* 4

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

American Dredging Co. v. Miller, 510 U.S. ___, 114 S.Ct. 981 (1994) 4, 5, 6

Anderson v. Whittaker Corp., 692 F.Supp. 764 (W.D. Mich. 1988), *aff'd in part, rev'd in part on other grounds*, 894 F.2d 804 (CA6 1990) 6

East River S.S. Corp. v. Transamerica Delaval, 476 U.S. 858 (1986) 2

Foremost Ins. Co. v. Richardson, 457 U.S. 668 (1982) 2

Kelly v. Panama Canal Comm'n, 26 F.3d 597 (CA5 1994) 6

Miles v. Apex Marine Corp., 498 U.S. 19 (1990) 6

Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978) 6

Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970) ..... *passim*

Sisson v. Ruby, 497 U.S. 358 (1990) 2

Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917) 4

Spiller v. Thomas M. Lowe, Jr. & Assocs., Inc., 466 F.2d 903 (CA8 1972) 6

Sutton v. Earles, 26 F.3d 903 (CA9 1994) 6

The Harrisburg, 119 U.S. 199 (1886) 3, 4, 7

The Lottawanna, 88 U.S. (21 Wall.) 558 (1875) 3

Wahlstrom v. Kawasaki Heavy Industries, Ltd., 4 F.3d 1084 (CA2 1993), *cert. denied*, 510 U.S. ___, 114 S.Ct. 1060 (1994) 6

Walker v. Braus, 995 F.2d 77 (CA5 1993) 6

ARGUMENT

No one contests the proposition that this case falls within admiralty jurisdiction. The fundamental question presented to this Court, then, is: what does this mean? Respondents would have this Court hold that it means next to nothing. Respondents see the maritime nature of this case as nothing more than a procedural device that enables a federal court to assume jurisdiction. It is more than that, however. With admiralty jurisdiction comes the application of substantive admiralty law. That law, as it applies to deaths in territorial waters, is this Court's decision in *Moragne v. State Marine Lines, Inc.*, 398 U.S. 375 (1970) – to the exclusion of state law.

I. BY SEEKING TO LIMIT *MORAGNE* TO ITS FACTS, RESPONDENTS IGNORE BOTH THE RULE OF THAT CASE AND THE PRINCIPLE IT WAS INTENDED TO ADVANCE

The Calhouns suggest *Moragne* does not apply to their case since Natalie Calhoun was not a longshoreman and her claim is not one for unseaworthiness. Because they characterize her death as resulting from a breach of state tort products liability law, the Calhouns argue it would be unfair to compensate them under a scheme geared toward the maritime worker. In doing so, they confuse liability with remedy and remedy with damages.

Rule 29.1 Statement: The Court is directed to Petitioners' principal brief, at p. iii.

Respondents have claimed against Petitioners on the theories of negligence and products liability. Those theories of liability are recognized in admiralty just as they are under general, land-based law. While the Respondents are correct in noting that Yamaha manufactures and markets many products that are operated on land, in this case Yamaha is being sued as a boatbuilder because of an alleged deficiency in the vessel Natalie Calhoun was operating on navigable waters. This Court has specifically recognized that a products liability claim asserting a vessel deficiency alleges a breach of a maritime duty, *East River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858 (1986).

In *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982) and *Sisson v. Ruby*, 497 U.S. 358 (1990), this Court held that casualties involving recreational vessels on navigable waters are within admiralty from both a jurisdictional and choice-of-law standpoint. The Calhouns' claim is maritime in nature, and their recovery must be determined under admiralty law.

Why should the rule announced in a case involving a longshoreman apply to the death of a 12-year-old girl riding a personal watercraft? Simply put, it would require both a myopic reading of *Moragne* and a fundamental misunderstanding of the role of this Court to conclude otherwise. As the ultimate architect of the law of the land, the Supreme Court does more than decide individual cases. By resolving individual controversies, the Court announces rules that are to be generalized by the lower courts to advance the principles espoused by this Court.

In *Moragne* this Court created a general maritime law death remedy for deaths caused on territorial waters. The guiding principle behind *Moragne* was uniformity of maritime remedy. Recognizing both the Constitutional mandate of "a system of law co-extensive with, and operating uniformly in, the whole country", *The Lottawanna*, 88 U.S. (21 Wall.) 558 (1875), and the chaos that had resulted in the absence of such uniformity, the Court announced "a right to recover for wrongful death under general maritime law" in order to "assure uniform vindication of federal policies" and "remov[e] the tensions and discrepancies" that had resulted from the application of state law during *The Harrisburg* era. *Moragne*, 398 U.S. at 401-02.

The Court's wording of the rule announced in *Moragne* is patently indicative of a broader intent. The court did not speak only in terms of a remedy for wrongful death of a longshoreman killed due to unseaworthiness. Rather, *Moragne* announced "an action does lie under the general maritime law for deaths caused by violation of maritime duties." *Moragne*, 398 U.S. at 408.

Given that *Moragne* was expressly intended to advance the principle of uniformity, it would be counterproductive to restrict its rule as Respondents suggest. If *Moragne* is limited to maritime workers, the disharmony resulting from the continued application of state tort law to civilian claimants would render any inroads toward uniformity illusory, and *Moragne* would have accomplished nothing. *Moragne* makes no sense unless it is construed to apply to all maritime claimants in territorial waters and can foster uniformity only if it is applied broadly and uniformly.

The circumstances surrounding *Moragne* further confirm the broad intent of its authors. Nearly a century earlier, this Court had ruled in *The Harrisburg*, 119 U.S. 199 (1886) (a case involving the death of a seaman allegedly due to negligence), that there was no right of action for wrongful death under the general maritime law. If the *Moragne* Court had intended to create a remedy solely for the deaths of longshoremen resulting from unseaworthiness, it could easily have done so without overruling *The Harrisburg*, which had already been effectively negated on its own facts with the enactment of the Jones Act in 1920. In overruling *The Harrisburg*, the Court removed the bar to recovery for the deaths of all "human beings", not just seamen or maritime workers. *See The Harrisburg*, 119 U.S. at 204; *Moragne*, 398 U.S. at 409.

II. RESPONDENTS WOULD HAVE THIS COURT APPLY LAND-BASED PREEMPTION METHODOLOGY RATHER THAN THE ADMIRALTY DISPLACEMENT SCHEME OUTLINED IN *AMERICAN DREDGING*

The Calhouns' arguments regarding the interplay between state and federal law are most remarkable for what they do not say. Rather than addressing the maritime choice-of-law analysis in *American Dredging Co. v. Miller*, 510 U.S. ___, 114 S.Ct. 981 (1994), they attack the decision in which the doctrine originated, *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), without acknowledging (1) that the criticism directed toward *Jensen* has centered more on its abstract criteria than its actual result; or (2) that the alternative standards set forth in the concurring opinions in *American Dredging* are equally favorable to Yamaha.

In *American Dredging*, the question was whether a state statute rendering the doctrine of *forum non conveniens* unavailable in Jones Act cases brought in state courts was preempted by federal maritime law, which recognizes and enforces that doctrine. The Court in *American Dredging* characterized the issue before it as "whether the doctrine of *forum non conveniens* is either a 'characteristic feature' of admiralty or a doctrine whose uniform application is necessary to maintain the 'proper harmony' of maritime law," 114 S.Ct. at 985, and held that it was neither. After acknowledging that the interplay between state and federal law had not been set forth clearly in its previous decisions, the majority stated:

> Wherever the boundaries of permissible state regulation may lie, they do not invalidate state rejection of *forum non conveniens*, which is in two respects quite dissimilar from any other matter that our opinions have held to be governed by federal admiralty law: it is procedural rather than substantive, and it is most unlikely to produce uniform results.

Id. at 988.

The Calhouns' reluctance to address *American Dredging* is both understandable and predictable, because the *American Dredging* approach compels the application of the maritime death remedy to the exclusion of state law. *Moragne* and its progeny create an established general maritime rule of law that is indisputably substantive. While state and federal regulation of maritime activity may be coextensive, under *American Dredging* the substantive remedies of their respective tort systems must be mutually exclusive.

As in *Moragne*, the guiding principle behind the Court's decision in *American Dredging* is uniformity of maritime remedy. The application of a state *forum non conveniens* rule is not offensive to this goal, because it does not affect the outcome of the case. On the other hand, the application of substantive state wrongful death statutes would undermine uniformity by producing differing and conflicting results.

The Calhouns and their *amici* suggest the application of *Moragne* to civilians such as their daughter would be a new and unwarranted intrusion of federal law into the sovereignty of the states. Nevertheless, the absence of supporting authority decided since *Moragne* is telling. During these same 25 years, this Court has expressly recognized the applicability of *Moragne* to seamen in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), and referred to the *Moragne* wrongful death remedy as a "national rule" in *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 624, n.18 (1978), a case involving civilian deaths. At the same time, virtually every court other than the court below has applied the *Moragne* wrongful death remedy to the exclusion of state remedies in cases involving claimants of all statuses, including civilians like Natalie Calhoun and her parents. *See, e.g., Wahlstrom v. Kawasaki Heavy Industries, Ltd.*, 4 F.3d 1084 (CA2 1993), *cert. denied*, 510 U.S. ___, 114 S.Ct. 1060 (1994); *Kelly v. Panama Canal Comm'n*, 26 F.3d 597 (CA5 1994); *Walker v. Braus*, 995 F.2d 77 (CA5 1993); *Anderson v. Whittaker Corp.*, 692 F.Supp. 764 (W.D. Mich. 1988), *aff'd in part, rev'd in part on other grounds*, 894 F.2d 804 (CA6 1990); *Spiller v. Thomas M. Lowe, Jr. & Assocs., Inc.*, 466 F.2d 903 (CA8 1972); *Sutton v. Earles*, 26 F.3d 903

(CA9 1994). *See also,* federal district and state court decisions cited at pp. 27 and 28 of Petitioners' principal brief.

Petitioners are not asking this Court to sail forward into new and uncharted waters. Rather, the Calhouns and their *amici* are asking the Court to disregard the evolution in the substantive maritime law that has taken place over the last quarter century and return to the chaotic days of *The Harrisburg*. It would be truly ironic, to say the least, if this restrictive interpretation of the very decision that overruled *The Harrisburg* could lead to its resurrection.

CONCLUSION

For the reasons set forth herein and in Section I of Yamaha's main brief, Petitioners respectfully urge this Court to reverse the decision of the Court of Appeals.

Respectfully submitted,

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October 6, 1995

Supreme Court, U.S.
FILED
JUL 26 1995
CLERK

(6)

No. 94-1387

In the Supreme Court of the United States

OCTOBER TERM, 1995

YAMAHA MOTOR CORPORATION, U.S.A., ET AL.,
PETITIONERS

v.

LUCIEN B. CALHOUN, ETC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether, with the recognition of a general federal maritime cause of action for maritime death in *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970), admiralty courts may continue to apply state law to determine the remedies available in cases involving the deaths of non-seamen in territorial waters.

2. Whether, under 28 U.S.C. 1292(b), the courts of appeals can exercise jurisdiction over any question that is included within the order that contains the controlling question of law identified by the district court.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	6
Argument:	
I. The general federal maritime cause of action for wrongful death recognized in *Moragne* v. *States Marine Lines, Inc.* supplies the exclusive remedy in cases involving the deaths of non-seamen in territorial waters	
II. The court of appeals had jurisdiction under 28 U.S.C. 1292(b) to address the issue of whether state remedial statutes may apply to respondents' lawsuit, because that question was relevant to the validity of the order certified by the district court	24
Conclusion	30

TABLE OF AUTHORITIES

Cases:

Aldridge v. *Lily-Tulip, Inc. Salary Retirement Plan Benefits Comm.*, 40 F.3d 1202 (11th Cir. 1994)	26
American Dredging Co. v. *Miller*, 114 S. Ct. 981 (1994)	14
Armstrong v. *Bush*, 924 F.2d 282 (D.C. Cir. 1991)	26
Bersch v. *Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir.), cert. denied, 423 U.S. 1018 (1975)	26
Carlisle Packing Co. v. *Sandanger*, 259 U.S. 255 (1922)	15
Chelentis v. *Luckenbach S.S. Co.*, 247 U.S. 372 (1918)	15
Cinematronics, Inc., In re, 916 F.2d 1444 (9th Cir. 1990)	26
Cipollone v. *Liggett Group, Inc.*, 789 F.2d 181 (3d Cir. 1986), cert. denied, 479 U.S. 1043 (1987)	26
Dailey v. *National Hockey League*, 987 F.2d 172 (3d Cir.), cert. denied, 114 S. Ct. 67 (1993)	26
Director, OWCP v. *Perini N. River Assocs*, 459 U.S. 297 (1983)	16

Cases—Continued: Page

Ducre v. *Executive Officers of Halter Marine, Inc.*, 752 F.2d 976 (5th Cir. 1985) 26, 28
Easley v. *Pettibone Michigan Corp.*, 990 F.2d 905 (6th Cir. 1993) 26
Edwardsville Nat'l Bank & Trust Co. v. *Marion Lab., Inc.*, 808 F.2d 648 (7th Cir. 1987) 25, 26, 27
Evich v. *Morris*, 819 F.2d 256 (9th Cir.), cert. denied, 484 U.S. 914 (1987) 13
Foremost Ins. Co. v. *Richardson*, 457 U.S. 668 (1982) . 21, 22
Gillespie v. *United States Steel Corp.*, 379 U.S. 148 (1964) 9, 12
Goett v. *Union Carbide Corp.*, 361 U.S. 340 (1960) 10
Grant Smith-Porter Ship Co. v. *Rohde*, 257 U.S. 469 (1922) 16
Harley-Davidson, Inc. v. *Minstar, Inc.*, 41 F.3d 341 (7th Cir. 1994), cert. denied, 115 S. Ct. 1401 (1995) 26
Hess v. *United States*, 361 U.S. 314 (1960) 10-11
Ivy Club v. *Edwards*, 943 F.2d 270 (3d Cir. 1991), cert. denied, 503 U.S. 914 (1992) 26
Jerome B. Grubart, Inc. v. *Great Lakes Dredge & Dock Co*, 115 S. Ct. 1043 (1995) 21, 22-23
Johnson v. *Alldredge*, 488 F.2d 820 (3d Cir. 1973), cert. denied, 419 U.S. 882 (1974) 26
Joint E.& S. Dist. of N.Y. Asbestos Litig., In re, 897 F.2d 626 (2d Cir. 1990) 26
Just v. *Chambers*, 312 U.S. 383 (1941) 11
Kermarec v. *Compagnie Generale Transatlantique*, 358 U.S. 625 (1959) 15
Kernan v. *American Dredging Co.*, 355 U.S. 426 (1958) 12
Knickerbocker Ice Co. v. *Stewart*, 253 U.S. 149 (1920) . 16
Kossick v. *United Fruit Co.*, 365 U.S. 731 (1961) 14
Lindgren v. *United States*, 281 U.S. 38 (1930) 10
Mahnich v. *Southern S.S. Co.*, 321 U.S. 96 (1944) 12
Maryland Casualty Co. v. *Cushing*, 347 U.S. 409 (1954) 14

Cases—Continued: Page

Merican, Inc. v. *Caterpillar Tractor Co.*, 713 F.2d 958 (3d Cir. 1983), cert. denied, 465 U.S. 1024 (1984) 26
Messel v. *Foundation Co.*, 274 U.S. 427 (1927) 15
Miles v. *Apex Marine Corp.*, 498 U.S. 19 (1990) 5, 11, 18, 19, 22, 23
Miller v. *Bolger*, 802 F.2d 660 (3d Cir. 1986) 26
Mobil Oil Corp. v. *Higginbotham*, 436 U.S. 618 (1978) 18, 20, 22
Moragne v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970) ..... *passim*
Morse/Diesel, Inc. v. *Trinity Indus., Inc.*, 859 F.2d 242 (2d Cir. 1988) 26
Murphy v. *Heppenstall Co.*, 635 F.2d 233 (3d Cir. 1980), cert. denied, 454 U.S. 1142 (1981) 26
Nedd v. *United Mine Workers of America*, 400 F.2d 103 (3d Cir. 1968) 26
Nelson v. *United States*, 639 F.2d 469 (9th Cir. 1980) .. 13
Northern Coal & Dock Co. v. *Strand*, 278 U.S. 142 (1928) 10
Nuclear Eng'g Co. v. *Scott*, 660 F.2d 241 (7th Cir. 1981), cert. denied, 455 U.S. 993 (1982) 26
Offshore Logistics, Inc. v. *Tallentire*, 477 U.S. 207 (1986) 8, 9, 20
Panama R.R. v. *Johnson*, 264 U.S. 375 (1924) 10, 15
Peterson v. *Sealed Air Corp.*, 902 F.2d 1232 (7th Cir. 1990) 26
Pope & Talbot, Inc. v. *Hawn*, 346 U.S. 406 (1953) 15
Preston v. *Frantz*, 11 F.3d 357 (2d Cir. 1993), cert. dismissed, 115 S. Ct. 31 (1994) 13
Robins Dry Dock & Repair Co. v. *Dahl*, 266 U.S. 449 (1925) 15
Romero v. International Terminal Operating Co., 358 U.S. 354 (1959) 13
S/S Helena, In re, 529 F.2d 744 (5th Cir. 1976) 13
School Asbestos Litig., In re, 789 F.2d 996 (3d Cir.), cert. denied, 479 U.S. 852 (1986) 26

Cases—Continued: Page

Sea-Land Servs., Inc. v. *Gaudet*, 414 U.S. 573 (1974) 18, 19, 23
Seas Shipping Co. v. *Sieracki*, 328 U.S. 85 (1946) 11
Simon v. *G.D. Searle & Co.*, 816 F.2d 397 (8th Cir.), cert. denied, 484 U.S. 917 (1987) 26
Sisson v. *Ruby*, 497 U.S. 358 (1990) 21
Slade v. *Shearson, Hammill & Co.*, 517 F.2d 398 (2d Cir. 1974) 26
Southern Pac. Co. v. *Jensen*, 244 U.S. 205 (1917) 16
Steering Comm. v. *United States*, 6 F.3d 572 (9th Cir. 1993) 26
Swint v. *Chambers County Comm'n*, 115 S. Ct. 1203 (1995) 25, 29
Texaco Ref. & Mktg., Inc. v. *Estate of Dau Van Tran*, 808 S.W.2d 61 (Tex.), cert. denied, 502 U.S. 908 (1991) 13
The Hamilton, 207 U.S. 398 (1907) 9
The Harrisburg, 119 U.S. 199 (1886) 8, 9
The Lottawanna, 88 U.S. (21 Wall.) 558 (1874) 13, 14
The Roanoke, 189 U.S. 185 (1903) 14
The Tungus v. *Skovgaard*, 358 U.S. 588 (1959) 11
Union Fish Co. v. *Erickson*, 248 U.S. 308 (1919) 14
United States v. *Banco Cafetero Panama*, 797 F.2d 1154 (2d Cir. 1986) 26
United States v. *Connolly*, 716 F.2d 882 (Fed. Cir. 1983), cert. denied, 465 U.S. 1065 (1984) 26
United States v. *Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990), cert. denied, 498 U.S. 1046 (1991) .....
United States v. *Stanley*, 483 U.S. 669 (1987) 7, 25
Wahlstrom v. *Kawasaki Heavy Indus., Ltd.*, 4 F.3d 1084 (2d Cir. 1993), cert. denied, 114 S. Ct. 1060 (1994) 13, 19
Walsh v. *Ford Motor Co.*, 807 F.2d 1000 (D.C. Cir. 1986), cert. denied, 482 U.S. 915 (1987) 26
Washington v. *W.C. Dawson & Co.*, 264 U.S. 219 (1924) 16

Cases—Continued: Page

Western Fuel Co. v. *Garcia*, 257 U.S. 233 (1921) 10, 16
Workman v. *New York City*, 179 U.S. 552 (1900) 15

Statutes:

Death on the High Seas Act, 46 U.S.C. App. 761 *et seq.* .. 3-4
§ 1, 46 U.S.C. App. 761 9
§ 7, 46 U.S.C. App. 767 ..... 6, 7, 20, 21
Federal Employers' Liability Act, 45 U.S.C. 51-60 9
Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* 16
33 U.S.C. 905(b) 11
Merchant Marine Act of 1920, 46 U.S.C. App. 688 4
Public Vessels Act §§ 1-9, 46 U.S.C. App. 781-789 2
Suits in Admiralty Act §§ 1-12, 46 U.S.C. App. 741-752 ... 1-2
28 U.S.C. 1292(b) (Supp. 1992) 4, 7, 24, 25, 26, 27, 28
28 U.S.C. 1332 3
28 U.S.C. 1333 3
42 Pa. Cons. Stat. Ann. (1982 & Supp. 1995):
§ 8301 2
§ 8302 2

Miscellaneous:

G. Gilmore & C. Black, *The Law on Admiralty* (2d ed. 1975) 11, 12
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Note, *Interlocutory Appeals in the Federal Courts under 28 U.S.C. § 1292(b)*, 88 Harv. L. Rev. 607 (1975) 27
S. Rep. No. 2434, 85th Cong., 2d Sess. (1958) 27
C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* (1977) 27

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The United States operates thousands of ocean-going vessels and aircraft in the course of its governmental and military activities. The United States also is responsible for assuring that safe conditions exist within many navigable areas accessible to private boats, such as the waters surrounding United States naval stations, and to that end prepares nautical charts, dredges channels, and operates locks, dams, lighthouses, and buoys. The United States has waived its sovereign immunity from civilian suits arising within admiralty jurisdiction and is subject to wrongful death actions in much the same manner as private parties. See Suits in Admiralty Act §§ 1-12, 46

U.S.C. App. 741-752; Public Vessels Act §§ 1-9, 46 U.S.C. App. 781-789. The United States has a strong interest in encouraging fair, uniform, and harmonious remedies for the redress of wrongful death on navigable waters. The Court requested the views of the United States in *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970), a case raising issues closely related to the first question on which certiorari was granted in this case.

STATEMENT

1. On July 6, 1989, while vacationing with her parents at a resort hotel in Puerto Rico, 12-year-old Natalie Calhoun, the daughter of respondents Lucien B. and Robin L. Calhoun, rented a Yamaha jet-ski watercraft known as a "Wavejammer." While riding the Wavejammer, Natalie ran into a vessel anchored in the waters off the hotel frontage and was killed. Pet. App. A3-A4.

Respondents, individually and as the administrators of their daughter's estate, brought suit in United States District Court for the Eastern District of Pennsylvania against petitioners Yamaha Motor Company, Ltd., and Yamaha Motor Corporation, U.S.A. (Yamaha), respectively the manufacturer and distributor of the Wavejammer. Respondents sought recovery under Pennsylvania's wrongful death statute (42 Pa. Cons. Stat. Ann. § 8301 (1982 & Supp. 1995)) and its survival statute (*id.* § 8302 (1982 & Supp. 1995)), alleging theories of negligence, strict liability, and breach of implied warranties of merchantability and fitness for purpose. Respondents sought damages for lost future earnings, loss of society, loss of support and services, and funeral expenses, along with punitive damages. Respondents' complaint invoked federal jurisdiction both on the basis of

diversity of citizenship (28 U.S.C. 1332)[1] and admiralty (28 U.S.C. 1333). Pet. App. A4-A5.

Yamaha moved for partial summary judgment, arguing that the damages recoverable for Natalie's death, if any, are governed by the general federal maritime cause of action recognized in *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970), and that, where that cause of action applies, it ousts state remedies. Yamaha further argued that, under the federal maritime cause of action, only Natalie's funeral expenses could be compensable as an element of damages. Pet. App. A5 & n.3. Respondents replied with alternative arguments that state remedial statutes may be applied to Natalie's death, but that, even if they do not apply, the federal maritime cause of action permits the award of the damages that respondents had sought. *Id.* at A55-A56.

2. The district court granted partial summary judgment to Yamaha. Pet. App. A52. It agreed with Yamaha that the federal maritime cause of action applies to respondents' claims arising out of Natalie's death, *id.* at A56-A58, and that state remedies do not apply. *Id.* at A59-A65. The court reasoned that allowing state remedies to govern maritime deaths would be inconsistent with this Court's goal of having the causes of action applicable to such deaths be federally defined ones "of national architecture." *Id.* at A63-A64. The court held, however, that in defining the federal maritime remedy and the damages available thereunder, courts may consider how States generally have responded to the problem of wrongful death, in addition to how the Death on the High Seas Act (DOHSA), 46 U.S.C. App. 761 *et.*

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[1] Respondents are citizens of Pennsylvania. Yamaha Motor Corporation, U.S.A., is a California corporation, and Yamaha Motor Company, Ltd., is a Japanese corporation. Pet. App. A4 n.2.

seq., which applies to deaths that occur more than three miles offshore, and the Merchant Marine Act, 1920 (Jones Act), 46 U.S.C. App. 688, which applies to the deaths of seamen, have addressed that situation. Pet. App. A65-A66. The court held that loss of society and loss of support are recoverable under the federal maritime remedy, but that lost future earnings and punitive damages are not, and accordingly granted Yamaha's motion for summary judgment with respect to those damages. *Id.* at A67-A72.

On Yamaha's motion, the district court certified for an interlocutory appeal the portion of its order denying summary judgment to Yamaha on the loss of society claim, finding the question whether such damages are recoverable under federal law to be a close one and "that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Pet. App. A73 (quoting 28 U.S.C. 1292(b)); Pet. App. A77. On respondents' motion, the court amended its certification to add to it the portions of its order dismissing respondents' claims for future earnings and punitive damages. *Id.* at A78-A79, A80-A83.

3. The court of appeals did not address the questions that the district court had certified. Instead, the court held that it was necessary first to consider the premise underlying the district court's dismissal of respondents' damages claims that, in cases arising out of the deaths of non-seamen in territorial waters, the federal maritime cause of action displaces applying state remedies. Pet. App. A4, A6-A7. That premise, the court held, was wrong. It held that whether state remedies are displaced by federal law turns on whether those remedies "significant[ly] conflict with federal policy." *Id.* at A9; see also *id.* at A11, A14.

The court of appeals held that neither a state wrongful death statute nor a state survival statute as applied to the death of a non-seaman in territorial waters poses such a conflict. The court noted that such fatalities are covered neither by DOHSA nor the Jones Act (Pet. App. A28), and that this Court's decisions had not shown "great hostility to the operation of state statutes in providing rules of decision in admiralty cases" (*id.* at A25). The court discounted the federal interest in uniform remedies for maritime death, because of "the weakness with which the principle of uniformity * * * has been actually applied" in the context of maritime deaths. *Id.* at A26.

Turning to the state causes of action at issue, the court held that remedies provided by state survival actions are not displaced, because the federal maritime cause of action as recognized in *Moragne* is for wrongful death, not survival. Pet. App. A28-A29.[2] The court found the issue of displacement of state wrongful death remedies "more difficult." *Id.* at A32, A34. However, the court held that state remedies are not displaced, because the federal maritime cause of action is not a "clearly articulated federal statutory scheme[]" (*id.* at A35), because relying on DOHSA's preemptive effect would effectively

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[2] The court of appeals did not address the possibility that the federal maritime cause of action includes some survival damage elements. See *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 34 (1990) (leaving that question open). The court found inconclusive the fact that DOHSA contains no survival provision, because DOHSA does not apply to deaths within territorial waters. Although the Jones Act contains a survival provision, the fact that survival damages under the Jones Act are limited to losses suffered during the decedent's lifetime did not restrict respondents from seeking damages based on Natalie's lost future earnings, because "the Jones Act applies only to seamen." Pet. App. A29-A31.

apply DOHSA "in an area (maritime deaths in state territorial waters) in which Congress explicitly intended DOHSA to have no such effect" (*id.* at A38), and because preclusion of state remedies was not needed to further *Moragne*'s goal of filling gaps in remedial coverage (*id.* at A37). The court also viewed Section 7 of DOHSA, 46 U.S.C. App. 767, as implicitly preserving concurrent state remedies for deaths in territorial waters. Pet. App. A37-A38. The court of appeals left for remand the issue whether respondents' state-law claims are governed by the laws of Pennsylvania (the forum state) or Puerto Rico (the site of the accident). *Id.* at A42.

SUMMARY OF ARGUMENT

I. This Court has long emphasized the importance of uniform maritime remedies and the consequent need for a single, federal remedial standard to apply where federal maritime law governs. In particular, in the area of maritime tortious personal injury not resulting in death, the Court has held that the interest in maritime uniformity precludes state remedies from applying. Until recently, however, the area of maritime wrongful death raised peculiar problems because general maritime law did not recognize a remedy for wrongful death. To fill the void caused by the absence of applicable federal law, admiralty courts adopted state-law cause of action and remedies. The decision in *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970), however, ended this regime by recognizing a general federal maritime cause of action for wrongful death.

After *Moragne*, there is no longer any justification for the historical anomaly of applying state-law remedies to maritime deaths. On the contrary, allowing state remedies to supplement the federal maritime remedy would

create "anomalies" and "incongruit[ies]" in remedial coverage similar to those that *Moragne* identified as a principal reason for recognizing a federal maritime cause of action. 398 U.S. at 395. Both the Death on the High Seas Act (DOHSA), which applies to deaths outside the three-mile territorial limit, and the Jones Act, which applies to deaths of seamen, displace state remedies where they apply. Application of state-law remedies where those statutes do not apply (*i.e.*, to the deaths of non-seamen in territorial waters) would accord a broader range of remedies to some survivors of such decedents for no justifiable reason. It would also be inconsistent with this Court's teaching that the federal maritime cause of action is to be developed with DOHSA and the Jones Act serving as primary guides.

Far from being applied with "weakness," the principle of remedial uniformity has served as the basis for this Court's attempts in recent years to harmonize the federal maritime remedy with remedies under DOHSA and the Jones Act. Nor does Section 7 of DOHSA demonstrate Congress's intent to preserve state remedies against a federal maritime cause of action. Finally, there is no basis for concluding that the federal maritime cause of action does not apply to "recreational boaters."

II. The court of appeals correctly held that it had jurisdiction under 28 U.S.C. 1292(b) to address the issue of the applicability of state remedies. The text of Section 1292(b) makes clear that a court of appeals has jurisdiction to review the *order* certified by the district court, not merely the question or questions of law that the district court has identified as controlling. That conclusion is supported by *United States* v. *Stanley*, 483 U.S. 669 (1987), by every federal court of appeals to have addressed the issue, and by the purpose of Section 1292(b)

to provide immediate appellate review of orders before they result in fruitless litigation and wasted expense.

ARGUMENT

I. THE GENERAL FEDERAL MARITIME CAUSE OF ACTION FOR WRONGFUL DEATH RECOGNIZED IN *MORAGNE* v. *STATES MARINE LINES, INC.*, SUPPLIES THE EXCLUSIVE REMEDY IN CASES INVOLVING THE DEATHS OF NON-SEAMEN IN TERRITORIAL WATERS

The question in this case is whether, in light of the recognition of a general federal maritime cause of action in *Moragne* v. *States Marine Line, Inc.*, 398 U.S. 375 (1970), admiralty courts may continue, as they did prior to *Moragne*, to apply state-law remedial statutes in cases involving the deaths of non-seamen in territorial waters. In the view of the United States, plaintiffs may not supplement the remedies provided by the federal cause of action recognized in *Moragne* by applying remedies available under a state wrongful death or survival statute. Applying such state statutes would be inconsistent with the general framework of admiralty law, which emphasizes uniform remedies for maritime injuries, and would frustrate *Moragne*'s goal of ending the process by which the law yielded "different results for breaches of duty in situations that cannot be differentiated in policy." *Id.* at 405.

A. The "tortuous development of the law of wrongful death in the maritime context," *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 212 (1986), begins with *The Harrisburg*, 119 U.S. 199 (1886), which held that, although general maritime law provides a cause of action for tortious personal injury not resulting in death, it does

not provide a cause of action for wrongful death. The Court reasoned that, because the common law at the time supplied no civil action for an injury which results in death on the land, no different rule should apply with respect to maritime deaths. *Id.* at 213; see *Tallentire*, 477 U.S. at 212; *Moragne*, 398 U.S. at 380.

The rule of *The Harrisburg* left remediless persons killed either within state territorial waters or on the high seas. "Unable to tolerate th[e] archaism" underlying *The Harrisburg*, some admiralty courts began to allow recovery for deaths within state territorial waters by adopting state statutes that permitted such recovery. *Tallentire*, 477 U.S. at 212. In addition, this Court held in *The Hamilton*, 207 U.S. 398 (1907), that admiralty courts could apply state wrongful death laws to deaths on the high seas. However, "probably because most state wrongful death statutes were not meant to have application to the high seas," the holding of *The Hamilton* "did little to fill the vacuum." *Moragne*, 398 U.S. at 393 & n.10; see also *Tallentire*, 477 U.S. at 212-214.

In 1920, Congress enacted two laws that together filled much of the void left by *The Harrisburg*. The first, DOHSA, provides a recovery for death "caused by wrongful act, neglect or default occurring on the high seas." 46 U.S.C. App. 761. DOHSA displaces state court remedies where it applies. *Tallentire*, 477 U.S. at 232. The second, the Jones Act, an omnibus statute to promote the welfare of American seamen, in its pertinent part accords seamen the same remedies for death as are provided in the Federal Employers' Liability Act, 45 U.S.C. 51-60, whether such death occurs in territorial waters or on the high seas. Like DOHSA, the Jones Act displaces state wrongful death remedies where it applies. See *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 155 (1964) (Jones Act is "of general application intended

to bring about the uniformity in the exercise of admiralty jurisdiction required by the Constitution, and necessarily supersedes the application of the death statutes of the several States") (quoting *Lindgren* v. *United States*, 281 U.S. 38, 44 (1930)); accord *Northern Coal & Dock Co.* v. *Strand*, 278 U.S. 142, 147 (1928); *Panama R.R.* v. *Johnson*, 264 U.S. 375, 392 (1924).

The federal courts, however, continued to struggle with that portion of *The Harrisburg*'s legacy that was undisturbed by Congress—the absence of a federal maritime cause of action for wrongful death of non-seamen occurring in the territorial waters. In 1921, this Court held that, in such cases, admiralty courts could adopt the cause of action for wrongful death provided by the State in whose waters a death occurred:

> [w]here death upon such waters results from a maritime tort committed on navigable waters within a State whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel *in personam* for the damages sustained by those to whom such right is given. The subject is maritime and local in charact r and the specified modification of or supplement to the rule applied in admiralty courts, when following the common law, will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations.

Western Fuel Co. v. *Garcia*, 257 U.S. 233, 242 (1921). However, over the next 50 years, the Court rendered a series of maritime decisions, which it ultimately found difficult to reconcile, attempting to apply state wrongful death statutes in admiralty cases. See *Goett* v. *Union*

Carbo Corp., 361 U.S. 340 (1960); *Hess* v. *United States*, 361 U.S. 314 (1960); *The Tungus* v. *Skovgaard*, 358 U.S. 588 (1959); *Just* v. *Chambers*, 312 U.S. 383 (1941). Much of the problem resulted from the holding in *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946), that the traditional admiralty duty of shipowners to provide seamen with a seaworthy ship extends to longshoremen, who are not seamen.[3] Because unseaworthiness is a "species of liability without fault," *id.* at 94, state wrongful death statutes that provided recovery only for negligent conduct were either held not to encompass claims of unseaworthiness or, if so held, were manifestly ill-suited to those claims. See G. Gilmore & C. Black, *The Law on Admiralty* § 6-31, at 365-367 (2d ed. 1975) (attempts to apply state wrongful death laws to claims of unseaworthiness were a "jurisprudential disaster").

In *Moragne*, the Court revisited *The Harrisburg*. Moragne, a longshoreman, had been killed while working on a ship within Florida territorial waters. His widow's claim for relief based on the ship's unseaworthiness had been dismissed, because neither federal statute or general maritime law provided a wrongful death action where the death had occurred in territorial waters, and because Florida wrongful death law required a showing of negligence and therefore did not apply to cases of death caused by non-negligent unseaworthiness. The Court overruled *The Harrisburg* and held that "an action does lie under general maritime law for death caused by violation of maritime duties," including the duty to

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[3] That holding was made obsolete by the 1972 amendments to the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 905(b), which precluded longshoremen from taking advantage of the doctrine of unseaworthiness. See *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 30 n.1 (1990).

provide a seaworthy ship. *Moragne*, 398 U.S. at 409. *The Harrisburg* had "rested on a most dubious foundation when announced," the Court observed, and with the later adoption of wrongful death statutes by all 50 States and by Congress in various enactments including DOHSA and the Jones Act, "it ha[d] become an increasingly unjustifiable anomaly." *Id.* at 404; see also *id.* at 379-393.

A federal maritime cause of action was also needed, the Court stated, to eliminate three unjustifiable "anomalies" or "incongruit[ies]" in existing law applicable to maritime death. *Moragne*, 398 U.S. at 395-396. First, victims of unseaworthiness within territorial waters could recover if they had been injured but not if they had been killed. *Id.* at 395.[4] Second, because unseaworthiness claims are cognizable under DOHSA, an identical breach of the duty to provide a seaworthy ship would produce liability for high-seas fatalities but not for fatalities within the territorial waters of a State whose tort remedies did not encompass claims of unseaworthiness. *Ibid.* Third, because the Jones Act precludes state remedies, a seaman would not receive a remedy for death in territorial waters caused by unseaworthiness, whereas a longshoreman would enjoy such a remedy if one were available under state law. *Id.* at 395-396. The Court envisioned that the newly recognized federal cause of action for wrongful maritime death would eliminate such "litigation-spawning confusion" and "supplant the present disarray in this area with a rule both simpler and

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[4] The Court's reference was to seamen, who enjoyed a federal cause of action for unseaworthiness where they were injured, see *Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96, 99 (1944), but not where they were killed. See *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 155 (1964); *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 428-430 (1958); G. Gilmore & C. Black, *supra*, § 6-32, at 368.

more just" than that of *The Harrisburg*. The new federal cause of action would also end the process by which the law yielded "different results for breaches of duty in situations that cannot be differentiated in policy," and assure the "uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts." *Id.* at 401, 404-405.

B. The Court had no occasion in *Moragne* to consider whether, with the recognition of a federal cause of action, state wrongful death and survival statutes may continue to be used to determine the remedies available in cases involving the deaths of non-seamen in territorial waters. However, the courts of appeals to address that issue after *Moragne* (with the exception of the court of appeals below) have uniformly—and in our view, correctly—held that such remedies are not applicable.[5] The Court in *Moragne* sought to "give effect to the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country.'" 398 U.S. at 402 (quoting *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1874)). See *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 373, 374 (1959) (although "State and

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[5] See *Wahlstrom* v. *Kawasaki Heavy Indus., Ltd.*, 4 F.3d 1084, 1089 (2d Cir. 1993), cert. denied, 114 S. Ct. 1060 (1994); *Nelson* v. *United States*, 639 F.2d 469, 473 (9th Cir. 1980); *In re S/S Helena*, 529 F.2d 744, 753 (5th Cir. 1976); see also *Preston* v. *Frantz*, 11 F.3d 357, 358 (2d Cir. 1993) (federal maritime remedy preempts state survival statute), cert. dismissed, 115 S. Ct. 31 (1994); *Evich* v. *Morris*, 819 F.2d 256, 257-258 (9th Cir.) (same), cert. denied, 484 U.S. 914 (1987); *Texaco Ref. & Mktg., Inc.* v. *Estate of Dau Van Tran*, 808 S.W.2d 61, 64 (Tex.) (federal remedy preempts state wrongful death and survival actions), cert. denied, 502 U.S. 908 (1991).

Federal Governments jointly exert regulatory powers" over maritime law, "state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system"); *The Lottawanna*, 88 U.S. (21 Wall.) at 575 ("It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.").[6] Adoption of state law was necessary, prior to *Moragne*, in order to fill a remedial gap where wrongful conduct caused death rather than injury. After *Moragne*, however, there is no longer a need to use state law in this fashion, and the general principle of uniformity in admiralty should be enforced.

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[6] See also, *e.g.*, *Kossick* v. *United Fruit Co.*, 365 U.S. 731 (1961) (holding that a maritime contract is not subject to a state statute of frauds); *Maryland Casualty Co.* v. *Cushing*, 347 U.S. 409 (1954) (holding that a state direct action statute may not be applied against a maritime insurer); *Union Fish Co.* v. *Erickson*, 248 U.S. 308 (1919) (holding that a maritime contract is not subject to a state statute of frauds); *The Roanoke*, 189 U.S. 185 (1903) (holding that a State may not create a maritime lien against an out-of-state ship for costs incurred in repair). The admiralty cases upon which the court of appeals in this case relied (Pet. App. A8-A9) involved state rules of decision that were procedural in nature and did not "work [any] 'material prejudice to [a] characteristic featur[e] of the general maritime law.'" *American Dredging Co.* v. *Miller*, 114 S. Ct. 981, 987 (1994) (upholding Louisiana law preventing *forum non conveniens* doctrine from applying in maritime law cases brought in state court); see also *id.* at 990 (Souter, J., concurring) (determination whether a state rule is "substantive" or "procedural" will generally determine whether it is preempted under federal maritime law).

Of particular relevance here, where tortious personal injuries other than death have been inflicted within maritime jurisdiction, the interest in maritime uniformity has long been held to preclude the application of state remedies. A maritime tort is "a type of action which the Constitution has placed under national power to control in 'its substantive as well as its procedural features'" *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 409 (1953) (quoting *Panama R.R.*, 264 U.S. at 386. Accordingly, federal maritime law—rather than state law—determines the remedies for injury even when the tort has occurred within state territorial waters or when the plaintiff has invoked state court or diversity jurisdiction. See, *e.g.*, *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U.S. 625, 628 (1959); *Pope & Talbot*, 346 U.S. at 409-411. Likewise, before the enactment of the Jones Act, the Court rejected an injured seaman's argument that he was entitled to a state common law remedy of full indemnification rather than the applicable maritime remedy of maintenance and cure. See *Chelentis* v. *Luckenbach S.S. Co.*, 247 U.S. 372, 382 (1918).[7] The Court has also held that a longshoreman injured while unloading a ship, having been engaged in maritime activity, must invoke federal remedies rather than resort to state worker's compensation laws. Otherwise, application of the laws of different States would produce varying remedies in ports across the country

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[7] See also, *e.g.*, *Messel* v. *Foundation Co.*, 274 U.S. 427, 434 (1927) (requiring application of federal maritime law in a personal injury action brought in state court); *Robins Dry Dock & Repair Co.* v. *Dahl*, 266 U.S. 449, 457 (1925) (same); *Carlisle Packing Co.* v. *Sandanger*, 259 U.S. 255, 259 (1922) (same); *Workman* v. *New York City*, 179 U.S. 552, 557-558 (1900) (refusing to recognize a state law claim of municipal immunity in a negligence action brought in admiralty court).

and result in the "destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish." *Southern Pac. Co.* v. *Jensen*, 244 U.S. 205, 216-217 (1917).[8]

The adoption by admiralty courts of state death statutes before *Moragne* was therefore an historical anomaly. Had the federal maritime remedy for death been recognized in the nineteenth century, there can be little doubt that it would have been treated as an exclusive remedy under the principles of maritime uniformity that guided *Chelentis*, *Jensen*, and *The Lottawanna*. State remedies were adopted by admiralty courts only because, as long as *The Harrisburg* survived, wrongful death was "untouched" by general maritime law, *Western Fuel Co.*, 257 U.S. at 240, leaving it to state statutes to fill the remedial vacuum.

With the demise of *The Harrisburg* and the recognition of a federal maritime cause of action, there is no

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[8] Congress attempted to override the result in *Jensen* by authorizing the application of state worker's compensation statutes to maritime injuries. But this Court invalidated that attempt as an unconstitutional delegation of federal maritime power, holding that Congress could not authorize the States to prescribe rules governing maritime injuries that "would inevitably destroy the harmony and uniformity which the Constitution not only contemplated but actually established." *Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149, 164 (1920); see also *Washington* v. *W.C. Dawson & Co.*, 264 U.S. 219, 227-228 (1924) (invalidating later legislation on same ground). The Court did recognize an exception to *Jensen*, applicable in cases where "the application of the local law [would not] materially affect" the uniformity of maritime law. *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U.S. 469, 477 (1922). Ultimately, Congress passed the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, which prescribes exclusive federal standards for compensation to injured longshoreworkers and related maritime employees. See generally *Director, OWCP* v. *Perini N. River Assocs.*, 459 U.S. 297, 306-324 (1983).

longer any reason to allow state remedies to apply to maritime fatalities. On the contrary, to allow state remedial schemes providing a more generous measure of damages than the federal remedy to supplement that remedy would create at least three unjustifiable "anomalies" and "incongruit[ies]" (*Moragne*, 398 U.S. at 395-396) similar to those that *Moragne* sought to eliminate. First, because federal remedies for non-fatal injuries within maritime jurisdiction preclude the application of state remedies, see pages 15-16, *supra*, identical breaches of maritime duties would be subject to different measures of damages, solely because the victim of one breach was killed whereas the victim of another was injured. Second, because DOHSA precludes state remedies for wrongful death on the high seas, beneficiaries of persons killed in territorial waters would have access to supplemental state remedies but beneficiaries of persons killed in identical accidents on the high seas would not. Third, because the Jones Act precludes state remedies for the wrongful death of seamen, beneficiaries of non-seamen would likewise in some cases be eligible for a broader range of remedies than beneficiaries of seamen. That result would seem inconsistent with the "special solicitude" that admiralty law has traditionally accorded seamen. See *Moragne*, 398 U.S. at 387.[9]

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[9] In *Moragne*, the Court also expressed dissatisfaction with the "difficult litigation" that had resulted from the need to apply state statutes to peculiarly maritime duties, such as that of seaworthiness. 398 U.S. at 408. The duty of seaworthiness presently extends only to seamen, as a result of legislation in 1972 that rendered that doctrine inapplicable to cases involving longshoremen. See note 3, *supra*. However, the Court's broader concern with the mismatch between state tort statutes and uniquely maritime duties and concepts continues to counsel against applying state remedies in this area. See *Moragne*, 398 U.S. at 401 n.15 ("Federal law, rather than state, is the more

Application of state-law remedies in this area would, finally, be inconsistent with the principle that the federal maritime remedy is to be developed with its statutory cousins, DOHSA and the Jones Act, serving as the "primary guide." See *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 624 & n.19 (1978); *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 27 (1990) ("[A]n admiralty court should look primarily to these legislative enactments for policy guidance," because Congress's enactments "both direct and delimit our actions"). *Mobil Oil* and *Miles* looked to DOHSA and the Jones Act for the purpose of answering questions relating to the damages recoverable under the federal maritime cause of action. The applicability of state remedies to that cause of action should similarly be patterned upon DOHSA and the Jones Act, both of which displace state remedies where they apply.[10]

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appropriate source of a remedy for violation of the federally imposed duties of maritime law").

[10] The Court declined to grant certiorari in this case on the question of the damages available under the federal maritime remedy, see 115 S. Ct. 1998 (1995), and that question is distinct from the question of applicability of state remedies. Several cases in the Court have involved the extent of those federal remedies. The Court initially held that, in addition to pecuniary losses (*e.g.*, loss of support), survivors of a person wrongfully killed may recover damages for loss of society. See *Sea-Land Servs., Inc.* v. *Gaudet*, 414 U.S. 573 (1974). More recently, the Court has held that such damages are not recoverable in cases to which DOHSA (*Mobil Oil*) or the Jones Act (*Miles*) would apply, so as to respect Congress's judgment that only pecuniary losses should be recoverable in cases governed by those statutes. *Miles* also stated that "[t]he holding of *Gaudet* applies only in territorial waters, and it applies only to longshoremen," see 498 U.S. at 31, while noting that subsequent legislation relating to longshoremen has rendered *Gaudet* inapplicable on its facts, see *id.* at 30 n.1. The Court has left open the question whether the federal maritime cause of action has a "survival"

C. In holding that state remedial statutes may apply to the deaths of non-seamen in territorial waters, the court of appeals relied on three factors, apart from the fact (Pet. App. A28) that Congress has not expressly preempted such claims. First, the court discounted the federal interest in the uniformity of remedies for maritime death, on the ground that this Court has applied the principle of uniformity "weak[ly]." *Id.* at A26. The sole disuniformity that the court of appeals identified, however, is the fact that loss-of-society damages are available under the federal maritime cause of action, see *Sea-Land Servs., Inc.* v. *Gaudet*, 414 U.S. 573 (1974), but not under DOHSA or the Jones Act. Pet. App. at A21, A26. The continued vitality of *Gaudet*, however, is open to question, as the Court in *Miles* appears to have confined *Gaudet* to cases involving longshore workers, observing that its ruling would "restore a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law." 498 U.S. at 33; see

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dimension allowing losses incurred by the decedent himself (*e.g.*, pain and suffering, future income, medical expenses) to be recovered. See *Miles*, 498 U.S. at 34; *id.* at 35 (noting that Jones Act contains a survival provision but that DOHSA does not). However, the Court has held, even if a federal maritime action seeking survival damages could proceed, the lost future earnings of a seaman would not be recoverable. See *id.* at 34. The Court reasoned that such damages are not recoverable under most state survival laws or under the Jones Act (which limits recovery to losses suffered during the decedent's lifetime), that lost-future-earnings damages often duplicate survivors' loss-of-support damages, and that recovery of lost future earnings is not "consistent with the general principles of maritime tort law." *Id.* at 35-36. See *Wahlstrom*, 4 F.3d at 1091-1094 (holding, based on analysis in *Miles*, that the estates of non-seamen are barred from recovering non-pecuniary damages and lost future earnings damages in a general federal maritime action).

also note 10, *supra*. It is true that the remedies prescribed by Congress in DOHSA and the Jones Act do not themselves mirror each other in all particulars (*e.g.*, the existence of a survival provision in the Jones Act but not in DOHSA). This Court, however, is free to shape the nonstatutory federal maritime remedy (including its preclusive effect over state law) to promote the interest in uniformity. In any event, any dissonance between the separate "national rule[s]" provided by DOHSA and the Jones Act, *Mobil Oil*, 436 U.S. at 624 n.18, cannot justify continuation of the much greater disuniformity produced by allowing fifty different state remedial schemes to govern maritime deaths.

The court of appeals also interpreted Section 7 of DOHSA, 46 U.S.C. App. 767, as signifying congressional intent to preserve state wrongful death remedies in territorial waters. Pet. App. A37-A38; *id.* at A34 n.34. That interpretation was incorrect. Section 7 provides:

> The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone.

As the Court held in *Tallentire*, Section 7 serves merely "as a *jurisdictional* savings clause" (emphasis added): It ensures that state courts would not be deprived, by virtue of DOHSA, of the right to continue to entertain suits arising out of maritime deaths. 477 U.S. at 221. Section 7 does not suggest that state remedies applicable to deaths in territorial waters would continue to apply notwithstanding the creation of the general federal maritime remedy for wrongful death in *Moragne*. Indeed, the language of Section 7 seems inconsistent with a

claim that it was intended to bear on the effect of later common law developments in federal maritime law. See DOHSA § 7, 46 U.S.C. App. 767 ("The provisions of any State statute * * * shall not be affected *by this chapter*.") (emphasis added).

Finally, the court of appeals suggested that the federal maritime cause of action for wrongful death might not extend to the deaths of "recreational boater[s]" in territorial waters, or that if it did, that it might simply be defined in those waters by the relevant State's remedies. See Pet. App. A10 n.7, A32 n.32; see also *id.* at A30 n.29 (defining a "recreational boater" as any person not covered by the Jones Act as a seaman). The court of appeals emphasized, however, that its holding did not turn on that theory. See *id.* at A10 n.7, A33 n.33, A34 n.34, A37 (stating that, even if the federal maritime cause of action applies to such deaths, concurrent state causes of action are not displaced).

To the extent that the court of appeals thus sought to limit the reach of (or to redefine) the federal maritime remedy, it was in error. Admiralty jurisdiction applies to recreational boating accidents on navigable waters, such as the fatal collision in this case between a jet-ski watercraft and an anchored vessel, as the court of appeals acknowledged. Pet. App. A7 n.5. See *Foremost Ins. Co.* v. *Richardson*, 457 U.S. 668, 675-677 (1982) (accident between two recreational vessels on navigable territorial waters bears sufficient relationship to traditional maritime activity to fall within scope of federal admiralty jurisdiction); *Sisson* v. *Ruby*, 497 U.S. 358, 365-367 (1990) (multi-boat fire caused by defective appliance aboard pleasure boat docked at marina falls within scope of admiralty jurisdiction); see also *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 115 S. Ct. 1043, 1049-1053 (1995). There is no basis for concluding that

the federal maritime cause of action applies only to those territorial-waters fatalities within admiralty jurisdiction that involve a seaman, or that, in territorial waters, the federal remedy is merely a vehicle for adopting state law when a seaman is not involved. On the contrary, *Moragne* itself noted that the recognition of a federal remedy was an attempt to advance the goal of making federal admiralty law "a system of law coextensive with, and operating uniformly in, the whole country." 398 U.S. at 402 (quotations omitted); see also *Mobil Oil*, 436 U.S. at 624 n.18 (referring to standard governing fatalities in territorial waters as a "national rule"); *Miles*, 498 U.S. at 30 ("There is * * * little question that *Moragne* intended to create a general maritime wrongful death action applicable beyond the situation of longshoremen").[11]

An approach that would restrict the federal maritime cause of action to certain categories of decedents (those who were not "recreational boaters") would also frustrate important maritime policies. Under such an approach, the same commercial vessel would have its conduct measured under federal standards were it to collide tortiously with another commercial vessel, but under state law were it to collide in identical fashion with a pleasure boat. Exposure to divergent standards of liability or measures of damages would have a significant potential to disrupt maritime commerce. See *Foremost*, 457 U.S. at 674-675 ("The federal interest in protecting maritime commerce * * * can be fully vindicated only if *all* operators of vessels on navigable waters are subject to uniform rules of conduct"); *Grubart*, 115 S. Ct. at

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[11] In cases involving recreational boating accidents on navigable waters, the lower federal courts have consistently applied the general federal maritime cause of action. See Pet. 11-12 & n.15 (citing cases).

1047. Moreover, because the use of state remedies in cases involving non-seamen decedents would often yield damages exceeding those in cases involving seamen decedents, the court of appeals' approach would be inconsistent with the historic admiralty policy of according "a special solicitude" for the welfare of those who "undert[ake] to venture upon hazardous and unpredictable sea voyages." *Moragne*, 398 U.S. at 387.[12]

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[12] The court of appeals also interpreted selected statements in *Gaudet*, *Miles*, and *Moragne* as endorsing the aplicability of state causes of action. *Gaudet*'s survey of the remedies available in state wrongfuldeath actions, however, does not connote "approv[al] of the application of state statutes in maritime death cases" (Pet. App. A21, citing 414 U.S. at 587-588), but rather, reflects an attempt (like that undertaken in *Moragne*) to use state law as a whole as one guide in shaping the federal maritime remedy. See also *Miles*, 498 U.S. at 27 (cited at Pet. App. A25). And *Moragne*'s observation that Congress had not affirmatively shown an intent to preclude a federal maritime death remedy does not suggest that affirmative legislative action is needed if state law is no longer to be used where the new federal maritime remedy applies (Pet. App. A20, citing 398 U.S. at 393); rather, it merely indicates that Congress had left the Court free to fashion a general maritime remedy.

II. THE COURT OF APPEALS HAD JURISDICTION UNDER 28 U.S.C. 1292(b) TO ADDRESS THE ISSUE OF WHETHER STATE REMEDIAL STATUTES MAY APPLY TO RESPONDENTS' LAWSUIT, BECAUSE THAT QUESTION WAS RELEVANT TO THE VALIDITY OF THE ORDER CERTIFIED BY THE DISTRICT COURT

A. The Court has requested briefing on whether, under 28 U.S.C. 1292(b), a court of appeals can "exercise jurisdiction over any question that is included within the order that contains the controlling question of law identified by the District Court." 115 S. Ct. 1998 (1995). In the view of the United States, a court of appeals may do so.

Section 1292(b) provides, in pertinent part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that *such order* involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal *from the order* may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals * * * may thereupon, in its discretion, permit an appeal to be taken *from such order*, if application is made to it within ten days after the entry of the order.

28 U.S.C. 1292(b) (emphasis added). The text of Section 1292(b) thus makes apparent that appellate jurisdiction applies to the *order* that the district court has certified to the court of appeals, and not merely to any question of

law that the district court may have identified in that order. While a district court may be well-advised to identify the question of law involved in its order that it perceives to be controlling, nothing in Section 1292(b) either requires it to do so, or conditions appellate jurisdiction on the district court's having done so.

The decision in *United States* v. *Stanley*, 483 U.S. 669 (1987), reinforces the conclusion that it is the district court's order—and not the question of law the court may formulate—that defines and delimits the court of appeals' jurisdiction. In *Stanley*, the Court held that a court of appeals lacks jurisdiction under Section 1292(b) to reach *beyond* the certified order to address other orders that had been entered in the case. The Court reasoned:

> An appeal under this statute is from the *certified order*, not from any other orders that may have been entered in the case. Even if the Court of Appeals' jurisdiction is not confined to the precise question certified by the lower court (*because the statute brings the "order," not the question, before the court*), that jurisdiction *is* confined to the particular order appealed from.

Id. at 677 (emphasis added to clause in parentheses); see also *Swint* v. *Chambers County Comm'n*, 115 S. Ct. 1203, 1211 (1995) (*Stanley* held that appellate review under Section 1292(b) was limited to the "certified order," and barred review of "other, non-certified orders"); *Edwardsville Nat'l Bank & Trust Co.* v. *Marion Lab., Inc.*, 808 F.2d 648, 650 (7th Cir. 1987) (Section 1292(b) "is not a method of certifying questions. The question is the *reason* for the interlocutory appeal, but the thing under review is the order"). Consistent with the Court's discussion in *Stanley*, the courts of

appeals[13] and commentators[14] have held uniformly that appellate jurisdiction extends under Section 1292(b) to

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[13] See, *e.g.*, *Walsh* v. *Ford Motor Co.*, 807 F.2d 1000, 1002 n.2 (D.C. Cir. 1986), cert. denied, 482 U.S. 915 (1987); *Armstrong* v. *Bush*, 924 F.2d 282, 296 n.13 (D.C. Cir. 1991); *Bersch* v. *Drexel Firestone, Inc.*, 519 F.2d 974, 994-995 (2d Cir.) (Friendly, J.), cert. denied, 423 U.S. 1018 (1975); *Slade* v. *Shearson, Hammill & Co.*, 517 F.2d 398, 400 (2d Cir. 1974); *United States* v. *Banco Cafetero Panama*, 797 F.2d 1154, 1156-1157 (2d Cir. 1986); *Morse/Diesel, Inc.* v. *Trinity Indus., Inc.*, 859 F.2d 242, 249 (2d Cir. 1988); *In re Joint E. & S. Dist. of N.Y. Asbestos Litig.*, 897 F.2d 626, 635 (2d Cir. 1990); *Nedd* v. *United Mine Workers*, 400 F.2d 103, 104 (3d Cir. 1968); *Johnson* v. *Alldredge*, 488 F.2d 820, 822-823 (3d Cir. 1973), cert. denied, 419 U.S. 882 (1974); *Murphy* v. *Heppenstall Co.*, 635 F.2d 233, 235 n.1 (3d Cir. 1980), cert. denied, 454 U.S. 1142 (1981); *Merican, Inc.* v. *Caterpillar Tractor Co.*, 713 F.2d 958, 962 n.7 (3d Cir. 1983), cert. denied, 465 U.S. 1024 (1984); *Cipollone* v. *Liggett Group, Inc.*, 789 F.2d 181, 187-188 (3d Cir. 1986), cert. denied, 479 U.S. 1043 (1987); *In re School Asbestos Litig.*, 789 F.2d 996, 1002 (3d Cir.), cert. denied, 479 U.S. 852, 915 (1986); *Miller* v. *Bolger*, 802 F.2d 660, 666-667 (3d Cir. 1986); *Ivy Club* v. *Edwards*, 943 F.2d 270, 275 (3d Cir. 1991), cert. denied, 503 U.S. 914 (1992); *Dailey* v. *National Hockey League*, 987 F.2d 172, 175 (3d Cir.), cert. denied, 114 S. Ct. 67 (1993); *Ducre* v. *Executive Officers of Halter Marine, Inc.*, 752 F.2d 976, 983n.16 (5th Cir. 1985); *Easley* v. *Pettibone Michigan Corp.*, 990 F.2d 905, 912 (6th Cir. 1993); *Nuclear Eng'g Co.* v. *Scott*, 660 F.2d 241, 246 (7th Cir. 1981), cert. denied, 455 U.S. 993 (1982); *Edwardsville Nat'l Bank & Trust Co.* v. *Marion Labs., Inc.*, 808 F.2d 648, 650-651 (7th Cir. 1987); *Peterson* v. *Sealed Air Corp.*, 902 F.2d 1232, 1233 (7th Cir. 1990); *Harley-Davidson, Inc.* v. *Minstar, Inc.*, 41 F.3d 341, 344 (7th Cir. 1994), cert. denied, 115 S. Ct. 1401 (1995); *Simon* v. *G.D. Searle & Co.*, 816 F.2d 397, 400 (8th Cir.), cert. denied, 484 U.S. 917 (1987); *In re Cinematronics, Inc.*, 916 F.2d 1444, 1448-1449 (9th Cir. 1990); *Steering Comm.* v. *United States*, 6 F.3d 572, 576 (9th Cir. 1993); *United States* v. *Fleet Factors Corp.*, 901 F.2d 1550, 1554 n.2 (11th Cir. 1990), cert. denied, 498 U.S. 1046 (1991); *Aldridge* v. *Lily-Tulip, Inc. Salary Retirement Plan Benefits Comm.*, 40 F.3d 1202, 1207 (11th Cir. 1994); *United States* v. *Connolly*, 716 F.2d 882, 884-885 (Fed. Cir. 1983), cert. denied, 465 U.S. 1065 (1984).

the order certified by the district court, and not just to the question of law identified in that order.

Permitting the court of appeals to consider the validity of the certified order furthers Section 1292(b)'s paramount goal of "providing an opportunity to review orders before they result in fruitless litigation and wasted expense." Note, *Interlocutory Appeals in the Federal Courts under 28 U.S.C. § 1292(b)*, 88 Harv. L. Rev. 607, 609 (1975). Where an order suffers from a legal infirmity unnoticed by the district court, a court of appeals should not be disabled from identifying or correcting that defect, and thereby from preventing fruitless litigation from ensuing in the district court. It is true, that the requirement of a final judgment often has that effect. But with Section 1292(b), Congress fashioned a considered exception to the final-judgment rule, so as to "materially advance the ultimate termination of the litigation," 28 U.S.C. 1292(b), and promote "expedition of cases pending before the district courts." S. Rep. No. 2434, 85th Cong., 2d Sess. 2 (1958).[15]

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[14] See, *e.g.*, 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 3929, at 144-145 (1977) ("the court of appeals may review the entire order, either to consider a question different than the one certified as controlling or to decide the case despite the lack of any identified controlling question") (footnotes omitted); 9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice* ¶ 110.25[1], at 300 (2d ed. 1994) ("it is the *order* that is appealable, and not the controlling question identified by the district court"); Note, *Interlocutory Appeals in the Federal Courts under 28 U.S.C. § 1292(b)*, 88 Harv. L. Rev. 607, 628-629 (1975).

[15] The fact that the court of appeals retains discretion under Section 1292(b) not to address a question in a certified order allows it to avoid rendering an advisory opinion where the question of law identified by the district court is, in the court of appeals' view, irrelevant to the validity of the order. See *Edwardsville Nat'l Bank*, 808 F.2d at 651 ("If

B. This case supplies an excellent illustration of the wisdom of Congress's decision in Section 1292(b) not to limit appellate review of an order to the particular question of law identified by the district court. The district court, having determined that respondents' state-law claims were inapplicable, issued an order dismissing those damage claims that it viewed as not viable under federal law. Pursuant to Section 1292(b), the district court then asked the court of appeals for its view on whether three types of damages were in fact recoverable under federal law. Had the court of appeals agreed that federal law governed respondents' remedies, it undoubtedly would have answered those questions.

In light of the court of appeals' view that state-law remedies *were* applicable, however, little purpose would have been served by its answering questions relating to the availability of damages under federal law, since the respondents sought recovery under more generous state-law remedial principles. And for the court of appeals simply to have declined review and allowed the district court to proceed with discovery and trial based on the (mistaken, in the court of appeals' view, belief) that respondent's state claims were inapplicable would have resulted in a substantial waste of time and resources and (assuming that respondents appealed) in a subsequent remand for a new trial to allow the dismissed state claims to go forward. See *Ducre* v. *Executive Officers of Halter Marine, Inc.*, 752 F.2d 976, 983 n.16 (5th Cir. 1985) (review under Section 1292(b) appropriate where issue not identified by district court may "provide grounds for reversal of the entire order"). By addressing the merits

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nothing turns on the answer to the question, it ought not to be answered.").

of the district court's order, the court of appeals acted to avoid those predictable inefficiencies.[16]

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[16] The order dismissing various damages claims as inconsistent with federal law (Pet. App. A52) was the second order issued in response to Yamaha's motion for summary judgment. Earlier, the district court had issued an order (*id.* at A51) that declared that respondents' right to recovery would be determined under federal admiralty law and requested briefing on the damage consequences of that ruling. The fact that the district court bifurcated its disposition of Yamaha's motion into separate orders did not, however, render appellate review of the applicability of state remedies improper under *Stanley*. Rather, the order granting summary judgment to Yamaha on some of respondents' damages claims was necessarily based on the finding that state remedies were inapplicable, as the district court explained when it certified that order. See *id.* at A74 (initial certifying order) ("The district court has concluded that admiralty jurisdiction attaches to these several counts and that they constitute a federal maritime cause of action"); *id.* at A78 (amended order) (same); see also Pet. App. A6 ("[T]he answer to the certified question depends in large part on the resolution of the displacement question. We presume that the district court intended this important question of displacement to be considered"); cf. *Swint*, 115 S. Ct. at 1212 (noting possibility that a ruling "inextricably intertwined" with an appealable ruling may itself be appealable).

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for the court of appeals to consider further the order certified by the district court.

Respectfully submitted.

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JULY 1995

No. 94-1387

Supreme Court, U.S.
FILED
JUL 26 1995
CLERK

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 2

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. This Case is Within the Federal Courts' Admiralty and Maritime Jurisdiction 5

A. The Requirements of Admiralty Jurisdiction 6

B. The Importance of Admiralty Jurisdiction for Choice of Law 8

II. Federal Law Presumptively Applies in Maritime Cases 8

A. Traditional Doctrine 9

B. Exceptions to the Traditional Rule 9

III. The Federal/State Choice of Law Determination 12

A. The Inadequacy of Existing Approaches 12

B. Federal/State Choice of Law Principles in Maritime Cases 15

1. Federal Law Shall Apply in the Absence of a Strong Policy Justifying the Application of State Law in a Particular Class of Cases 15

2. When Federal Law Should Apply, Federal Courts Have a Duty to Formulate the General Maritime Law as Necessary 16

TABLE OF CONTENTS – Continued

Page

IV. Federal Maritime Law Should Supply the Rule of Decision in Maritime Personal Injury and Death Cases 20

A. The Proposed Principles 20

B. The Gap Theory 21

C. The Maritime-but-Local Theory..... 23

V. The Court Should Resolve the First Question Presented in the Petition Regardless of Its Ruling on the Procedural Question Posed in the Order Granting Certiorari 24

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES:

American Dredging Co. v. Miller, 510 U.S. ___, 114 S. Ct. 981 (1994) 10, 11, 12, 16

Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973) 14

Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623 (CA1 1994) 11

Barbe v. Drummond, 507 F.2d 794 (CA1 1974) 22

Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888 (1988) 14

Byrd v. Byrd, 657 F.2d 615 (CA4 1981) 17

Chelentis v. Luckenbach S.S. Co., 247 U.S. 372 (1918) 7

Choat v. Kawasaki Motors Corp., 1994 AMC 2626 (Ala. 1994) 9

City of Milwaukee v. Cement Division, 515 U.S. ___, 115 S. Ct. 2091 (1995) 17

Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106 (1974) 17

East River S.S. Corp. v. Transamerica Delaval Inc., 476 U.S. 858 (1986) 8, 19

Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972) 5, 8, 20

Exxon Corp. v. Chick Kam Choo, 817 F.2d 307 (CA5 1987), *rev'd on other grounds*, 486 U.S. 140 (1988) 8

Fitzgerald v. United States Lines Co., 374 U.S. 16 (1963) 18

TABLE OF AUTHORITIES – Continued

Page

Foremost Ins. Co. v. Richardson, 457 U.S. 668 (1982) 5, 6, 23

The Hamilton, 207 U.S. 398 (1907) 20

Hess v. United States, 361 U.S. 314 (1960) 13

Irvin v. Amerada Hess Corp., 191 A.D.2d 478, 594 N.Y.S.2d 324 (1993) 9

Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. ___, 115 S. Ct. 1043 (1995) 5, 8, 10

Kelly v. Panama Canal Commission, 26 F.3d 597 (CA5 1994) 22

Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959) 7, 17, 19

Kossick v. United Fruit Co., 365 U.S. 731 (1961) 14

Lipworth v. Kawasaki Motors Corp. U.S.A., 592 So.2d 1151 (Fla. App.) (per curiam), *writ denied*, 601 So.2d 552 (Fla.), *cert. denied*, 113 S. Ct. 465 (1992) 9

Marastro Compania Naviera, S.A. v. Canadian Maritime Carriers, Ltd., 959 F.2d 49 (CA5 1992) 17

McDermott, Inc. v. AmClyde, 511 U.S. ___, 114 S. Ct. 1461 (1994) 17, 18

Meredith v. Winter Haven, 320 U.S. 228 (1943) 15

Miles v. Apex Marine Corp., 498 U.S. 19 (1990) 22, 23

Mink v. Genmar Industries, Inc., 29 F.3d 1543 (CA11 1994) 8, 22

Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978) 22

Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986) 7, 22

Pope and Talbot, Inc. v. Hawn, 346 U.S. 406 (1953) 7

Preston v. Frantz, 11 F.3d 357 (CA2 1993) (per curiam), *cert. dismissed*, 115 S. Ct. 31 (1994) 8, 22

Rodrigue v. Legros, 563 So.2d 248 (La. 1990) 11

Romero v. International Terminal Operating Co., 358 U.S. 354 (1959) 10

Sisson v. Ruby, 497 U.S. 358 (1990) 5

Stanton v. Bayliner Marine Corp., 123 Wash.2d 64, 866 P.2d 15 (1993), *cert. denied*, 115 S. Ct. 78 (1994) 9

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Wahlstrom v. Kawasaki Heavy Indus., Ltd., 4 F.3d 1084 (CA2 1993), *cert. denied*, 114 S. Ct. 1060 (1994) 8, 22

Walker v. Braus, 995 F.2d 77 (CA5 1993) 22

Western Fuel Co. v. Garcia, 257 U.S. 233 (1921) 13

Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1955) 10, 16

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND RULES:

28 U.S.C. § 1292(b) 24, 25

28 U.S.C. § 1333(1) 7

FED. R. APP. P. 5(a) 25

FED. R. CIV. P. 9(h) 7

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TABLE OF AUTHORITIES – Continued

Page

CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS (5th ed. 1994) 14

19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4507 (1982) 15

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American Steamship Owners Mutual Protection and Indemnity Association, Inc., Assuranceforeningen Gard (Gjensidig), Assuranceforeningen Skuld (Gjensidig), The Britannia Steam Ship Insurance Association Limited, The Japan Ship Owners' Mutual Protection and Indemnity Association, Liverpool and London Steamship Protection and Indemnity Association Limited, The London Steam Ship Owners Mutual Insurance Association Limited, The Newcastle Protection and Indemnity Association, The North of England Protecting and Indemnity Association Limited, The Shipowners' Mutual Protection and Indemnity Association (Luxembourg), The Standard Steamship Owners Protection and Indemnity Association (Bermuda) Limited, The Steamship Mutual Underwriting Association (Bermuda) Limited, Sveriges Angfartygs Assurans Forening, The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited, and The West of England Shipowners Mutual Insurance Association (Luxembourg) respectfully submit this brief as *amici curiae* in support of the petitioners.

Petitioners and respondents have given their consent to the filing of this brief, and their attorneys' letters granting consent are being filed with the Clerk of the Court in conjunction with this brief.

INTEREST OF AMICI CURIAE

Amici comprise fifteen mutual insurance associations known as "protection and indemnity clubs" (often abbreviated as "P&I clubs"). P&I clubs are "associations of

shipowners banded together to spread and absorb liabilities falling on their members." GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 76 (2d ed. 1975); *see also* LESLIE J. BUGLASS, MARINE INSURANCE AND GENERAL AVERAGE IN THE UNITED STATES 386-418 (3d ed. 1991). The members of *amici* are owners and operators of ships of practically all maritime nations. In the aggregate, *amici* insure tens of thousands of vessels totaling in excess of 400 million gross registered tons, or about 90% of the world's merchant ocean-going tonnage. *Amici* protect their members in respect of most of the liability risks that arise from the operation of vessels in international maritime commerce.

One significant liability risk for which *amici* insure their members is the risk that vessel owners will be held liable for damages for death or personal injury. *See, e.g.*, BUGLASS, *supra*, at 389-396. *Amici* and their members are particularly concerned about the deaths and injuries of seamen and other maritime workers, but there are also situations in which a member (and thus one of the *amicus* associations) might be liable for the death or injury of a recreational boater (*e.g.*, if a recreational boater collided with a vessel owned or operated by a member). Thus *amici* have a vital interest in the proper interpretation of the legal standards under which liability for death or personal injury may be imposed, including the choice between federal law (*i.e.*, acts of Congress and the general maritime law established by this Court and the lower federal courts) and state law.

Amici accordingly file this brief urging the Court to reverse the decision below and hold that any recovery for death or personal injury in a maritime case is governed

by relevant federal statutes and the general maritime law, which displace state law.

SUMMARY OF ARGUMENT

This is unquestionably a maritime case (*i.e.*, a case within the federal courts' admiralty jurisdiction), which means that the same substantive law applies whether the plaintiffs bring the action "in admiralty" or "on the law side" (relying on diversity jurisdiction).

Once this is recognized as a maritime case, federal law presumptively applies. It is possible to overcome this presumption, however, so that in appropriate circumstances state law may provide rules of decision in maritime cases. Unfortunately, no clear rule identifies those circumstances. This case offers the opportunity to clarify this important area of the law, and to provide the guidance that lower courts and private parties need.

The theories that have emerged from the current jurisprudence to identify when state law may apply are inadequate. *Amici* thus urge the Court to adopt two principles to govern the choice between federal and state law in maritime cases: (1) Federal law shall apply in the absence of a strong policy justifying the application of state law in a particular class of cases, and (2) When federal law should apply, federal courts have a duty to formulate the general maritime law as necessary.

Federal law should supply the rule of decision in maritime personal injury and death cases whatever

approach the Court takes here. Under the proposed principles advocated here, this conclusion is self-evident. But even under the inadequate theories that have emerged from the current jurisprudence, the decision below should be reversed.

Finally, *amici* urge the Court to resolve the important issue discussed here regardless of the answer it gives to the question posed in the order granting certiorari. Reversing on the procedural question without reaching the principal issue raised by this case would be a wasteful use of judicial resources and would leave the parties and the courts below in an intolerable position.

ARGUMENT

I

This Case is Within the Federal Courts' Admiralty and Maritime Jurisdiction

A. The Requirements of Admiralty Jurisdiction

Over the course of four decisions, this Court has firmly established the test for admiralty jurisdiction in maritime tort cases. *See Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. ___, 115 S. Ct. 1043 (1995); *Sisson v. Ruby*, 497 U.S. 358 (1990); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982); *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972). Two requirements must be satisfied: a location requirement and a connection with maritime activity requirement. *See, e.g., Grubart*, 115 S. Ct. at 1048.

The accident here occurred on navigable waters, in the ocean off the coast of Puerto Rico, thus satisfying the first requirement. The second is equally clear, for this Court recognized in *Foremost* that a collision between two vessels – even two pleasure boats – satisfies the connection with maritime activity requirement. 457 U.S. at 674-677. Indeed, for jurisdictional purposes this case is virtually indistinguishable from *Foremost*.[1]

As both requirements are satisfied, this is a case within the admiralty jurisdiction – a "maritime case."

B. The Importance of Admiralty Jurisdiction for Choice of Law

The court below stated in a footnote, "we doubt that the existence or non-existence of admiralty jurisdiction matters to the question of remedies." Petition ("Pet.") at A-7 n.5, 40 F.3d at 626 n.5. This statement is plainly wrong. If this were not a maritime case, the district

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[1] Unlike *Foremost*, one vessel was at anchor here, but that makes no difference to the jurisdictional analysis. *Sisson* recognized that "the storage . . . of a boat . . . on navigable waters" itself has a substantial relationship to a traditional maritime activity. 497 U.S. at 365-367. The record is unclear whether the anchored vessel was commercial or recreational, but any distinction on this score would simply bring the present case closer to "the heart of admiralty jurisdiction." *Id.* at 362 ("protecting commercial shipping is at the heart of admiralty jurisdiction"). Perhaps the most significant distinction with *Foremost* is the location. The accident here took place in the ocean, the classic highway of maritime commerce, whereas the *Foremost* accident took place in a shallow river "seldom, if ever, used for commercial traffic." 457 U.S. at 670 n.2. Again, the present case is even more clearly within the admiralty jurisdiction.

court's jurisdiction could only have been in diversity, where there would have been no basis for applying substantive federal law. The remainder of the footnote, however, suggests that the court of appeals instead meant to convey a different (and non-controversial) point: in a maritime case (*i.e.*, a case within the admiralty jurisdiction), the application of maritime law does not depend on whether the plaintiff brings the action "in admiralty" (relying on FED. R. CIV. P. 9(h)) or "on the law side" (relying on some other basis for jurisdiction, such as diversity).

As this Court recognized in *Pope and Talbot, Inc. v. Hawn*, 346 U.S. 406, 410-411 (1953), the same substantive law applies in all maritime cases, whether brought "in admiralty" or "on the law side." The *only* differences are those procedural issues spelled out in FED. R. CIV. P. 9(h). Thus a federal court exercising diversity jurisdiction in a maritime case must apply the same substantive law that would have applied if the case had in fact been brought "in admiralty." *See also, e.g., Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 628 (1959).

Furthermore, if a maritime case is brought in state court under the "saving to suitors clause" of 28 U.S.C. § 1333(1), the state court is obligated to apply the same substantive law that the federal admiralty court would have applied. This rule, known as the "reverse-*Erie*" doctrine, has been recognized by this Court at least since *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372 (1918). *See also, e.g., Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222-223 (1986).

In short, it is essential to recognize that this is a maritime case. And once that recognition is made, it follows that the same substantive rules should apply regardless of the forum in which the case is heard.

II

Federal Law Presumptively Applies in Maritime Cases

A. Traditional Doctrine

The court below claimed that there is a "presumption against preemption" of state law by federal maritime law. Pet. at A-30, 40 F.3d at 638; *see also* Pet. at A-13, 40 F.3d at 630. Although such a statement may be true in other areas of law, it has no application in admiralty. This Court has long recognized that " '[w]ith admiralty jurisdiction comes the application of substantive admiralty law.' " *Grubart, supra,* 115 S. Ct. at 1054 (quoting *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 864 (1986)). *See also, e.g., Executive Jet, supra,* 409 U.S. at 255 (satisfying jurisdictional requirements "invokes . . . the full panoply of the substantive admiralty law").

This traditional doctrine has had a major influence on the lower federal courts, which have regularly held that substantive maritime law follows almost automatically from a finding of admiralty jurisdiction. *See, e.g., Mink v. Genmar Industries, Inc.*, 29 F.3d 1543, 1547 (CA11 1994); *Preston v. Frantz*, 11 F.3d 357, 358 (CA2 1993) (per curiam), *cert. dismissed*, 115 S. Ct. 31 (1994); *Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4 F.3d 1084, 1087-88 (CA2 1993), *cert. denied*, 114 S. Ct. 1060 (1994); *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307, 316-325 (CA5 1987), *rev'd on other grounds*, 486 U.S. 140 (1988).

Even the state courts have widely applied something close to the traditional rule. *See, e.g., Choat v. Kawasaki Motors Corp.*, 1994 AMC 2626, 2628 (Ala. 1994); *Stanton v. Bayliner Marine Corp.*, 123 Wash.2d 64, 68, 866 P.2d 15, 17-18 (1993), *cert. denied*, 115 S. Ct. 78 (1994); *Texaco Refining and Marketing, Inc. v. Estate of Dau Van Tran*, 808 S.W.2d 61, 64 (Tex.), *cert. denied*, 502 U.S. 908 (1991); *Irvin v. Amerada Hess Corp.*, 191 A.D.2d 478, 479, 594 N.Y.S.2d 324, 325 (1993); *Lipworth v. Kawasaki Motors Corp. U.S.A.*, 592 So.2d 1151, 1154 (Fla. App.) (per curiam), *writ denied*, 601 So.2d 552 (Fla.), *cert. denied*, 113 S. Ct. 465 (1992).

Under the traditional admiralty view, there is more than a *presumption* for a federal rule of decision; federal maritime law applies instead of state law as soon as the case is recognized as "maritime." *See, e.g.*, DAVID W. ROBERTSON, ADMIRALTY AND FEDERALISM: HISTORY AND ANALYSIS OF PROBLEMS OF FEDERAL-STATE RELATIONS IN THE MARITIME LAW OF THE UNITED STATES 275 (1970) ("It seems always to have been regarded as so obvious as to necessitate no explanation or argument that the same considerations that constitute 'cases of admiralty and maritime jurisdiction' appropriate for decision by a separate tribunal indicate that such cases call for the application of separate substantive law.").

B. Exceptions to the Traditional Rule

It would be convenient if it were possible to end the choice-of-law analysis with the traditional rule, but that would be inconsistent with this Court's recognition of a number of situations in which state law has a role to play in governing maritime affairs. As recently as last year, the

Court held in *American Dredging Co. v. Miller*, 510 U.S. ___, 114 S. Ct. 981 (1994), that a state court deciding a maritime case could apply a state procedural rule. Earlier this year, the Court recognized in dicta that the "exercise of federal admiralty jurisdiction does not result in automatic displacement of state law." *Grubart, supra*, 115 S. Ct. at 1054. And, of course, *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955), and the jurisprudence that has developed under it recognize a substantial role for state law in marine insurance disputes. As the court explained in *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373 (1959), "to claim that all enforced rights pertaining to matters maritime are rooted in federal law is a destructive oversimplification of the highly intricate interplay of the States and the National Government in their regulation of maritime commerce."

These exceptions to the traditional rule demonstrate that the rule is not absolute, but its continued repetition proves that there is at least a strong presumption in favor of substantive federal maritime law when a case falls within the admiralty jurisdiction.

Unfortunately, there is no clear rule for deciding when the presumption (and thus federal law) applies or when state law supplies the rule of decision notwithstanding the maritime nature of the case. Justice Frankfurter noted that the issue was "highly intricate," *ibid.*, and went on to describe "[d]eterminations of this nature" as "among the most difficult and subtle that federal courts are called upon to make," *id.* at 375. The court below described the problem as "delicate," Pet. at A-42, 40 F.3d at 644, and "extremely tricky," Pet. at A-10, 40 F.3d at 628. Last year, JUSTICE SCALIA, writing for the Court

in *American Dredging*, was particularly forthright in noting the confusion in this area:

> It would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernible in our admiralty jurisprudence, or indeed is even entirely consistent within our admiralty jurisprudence.

114 S. Ct. at 987. Other courts and commentators have echoed this criticism.[2] *See generally* Robertson, *Displacement of State Law by Federal Maritime Law*, 26 J. MAR. L. & COM. 325 (July 1995) (forthcoming).

This case offers the Court the opportunity to clarify this "highly intricate" branch of the law, providing the guidance that lower courts need to decide the cases before them and that commercial parties (such as *amici* and their members) need to order their affairs.

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[2] *See, e.g., Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623, 624 (CA1 1994) ("one might tack a sailboat into a fog bank with more confidence" than to discern whether federal maritime law preempts state legislation); *Rodrigue v. Legros*, 563 So.2d 248, 253 (La. 1990) ("Despite [the] multitude of cases involving the applicability of state law in maritime situations, the Court has developed no clear test for determining when such application is appropriate and when it violates the constitution. Instead, the Court has generally stated only its conclusion as to whether the application of state law was permissible, and these conclusions have not always been theoretically consistent."); David P. Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 SUP. CT. REV. 158, 164 (characterizing the Court's admiralty-federalism decisions as "a complex maze of technical differentiations").

III

The Federal/State Choice of Law Determination

The choice between federal and state law is at the heart of this case. Although it is clear that there is a presumption for federal law in maritime cases, and equally clear that state law nevertheless supplies the rule of decision in some contexts, the Court has provided no clear and consistent approach for deciding what those contexts may be. This case offers the Court an opportunity to provide desperately needed guidance in this field.

A. The Inadequacy of Existing Approaches

Despite the confusion in the jurisprudence recognized by this Court in *American Dredging*, *see supra* at 10-11 & n.2, two principal[3] theories have emerged to explain when state law can provide the rule of decision in maritime cases: the "gap" theory and the "maritime-but-local" theory. Under the former, state law could validly be applied where there are "gaps" or "voids" in the general maritime law. *See generally* Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 Sup. Ct. Rev. 158, 167. Under the latter, state law could validly be applied "[w]hen there is no need for a uniform law because of the local nature of the business engaged in by the parties." *Id.* at 179.[4] Unfortunately, neither approach has worked.

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[3] Professor Robertson identifies five different approaches, but recognizes two of them as the most important. *See generally* Robertson, *Displacement*, *supra*, part II.D.

[4] Both theories find support in the decisions of this Court. On occasion, both theories find support in the same decision of

Professor Currie succinctly dismissed the gap theory:

> The gap theory was difficult to apply and artificial at best. It appeared to make the result depend on whether the issue had been previously adjudicated, ignored the policies of the states and the admiralty, and to a great extent denied the creative powers of the admiralty courts. Moreover, it failed to explain the cases.

Id. at 168.[5] As Currie hinted, the admiralty courts often use their "creative powers" to fashion new rules of general maritime law. *See infra* at 17 & n.7. The gap theory either ignores this possibility or fails to distinguish between cases in which the court should exercise this option and cases in which it should apply state law. Furthermore, the theory does not predict whether the absence of a maritime rule allowing recovery in a particular situation is a gap in the general maritime law or a rule that no recovery is available. *See, e.g., Hess v. United States*, 361 U.S. 314, 330 (1960) (Harlan, J., dissenting) ("It

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this Court! *See, e.g., Western Fuel Co. v. Garcia*, 257 U.S. 233, 240 (1921) ("the maritime law as generally accepted by maritime nations leaves the matter untouched"); *id.* at 242 ("subject is maritime and local in character"). Nevertheless, the theories are fundamentally opposed. The gap theory permits state law to apply when there is no existing general maritime law rule, regardless of whether the issue at hand is deemed "local." In contrast, the maritime-but-local theory would permit state law to preempt inconsistent general maritime law if the issue at hand is "local" enough. *See generally* Robertson, *Displacement, supra*, part II.D.

[5] For other criticism, *see, e.g.*, GILMORE & BLACK, *supra*, at 69; Robertson, *Displacement, supra*, part II.D.; Laughlin, *Choice of Law in the Federal Admiralty Court*, 10 J. MAR. L. & COM. 165, 181 (1979).

has been said that the application of state wrongful death statutes is permitted to 'fill a void' in maritime law. . . . But there is a 'void' only in the sense that there is an absence of a right of action in such cases; admiralty does not lack a rule on the subject.").

The "maritime-but-local" theory is a meaningless empty vessel. To have any value, it must be filled with other concepts – most of which are equally indeterminate – such as "interest analysis," *see, e.g., Kossick v. United Fruit Co.*, 365 U.S. 731, 739-741 (1961), or "traditional police powers of the states," *see, e.g., Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 328 (1973). The theory has no predictive power, and thus offers no guidance to the bench or bar. Consider, for example, the theory when supplemented with interest analysis. JUSTICE SCALIA has aptly captured the weakness of this approach in another "vertical conflict" situation where a choice must be made between state and federal law:

> This process is ordinarily called "balancing," but the scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy.

Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888, 897 (1988) (SCALIA, J., concurring) (citation omitted); *see also, e.g.*, CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 404 (5th ed. 1994).

B. Federal/State Choice of Law Principles in Maritime Cases

Amici respectfully urge the Court to adopt the following two principles to govern the choice between federal and state law in maritime cases: (1) Federal law shall apply in the absence of a strong policy justifying the application of state law in a particular class of cases, and (2) When federal law should apply, federal courts[6] have a duty to formulate the general maritime law as necessary.

1. Federal Law Shall Apply in the Absence of a Strong Policy Justifying the Application of State Law in a Particular Class of Cases. This first principle builds on the recognition that federal maritime law presumptively applies in an admiralty case. Because of the presumption, there must be a strong policy to overcome it. Furthermore, the policy determination must be made with due regard for the Supremacy Clause implications of the subject. No matter how strong the state considers its interest in applying a local rule, it cannot preempt an act of

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[6] Although state courts do not have a duty to fashion new rules of general maritime law, a state court should be required to predict the rule that the federal courts would fashion. This is the mirror image of a federal court's duty to predict how the state courts would decide a question of state law that is relevant in a federal case. *See, e.g.*, 19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4507, at 89 (1982). The impact of this requirement in the particular case before the court would be the same as if the state court had simply formulated a new rule itself, but a state court's prediction would not be authoritative in future cases – just as a federal court's conclusion regarding the proper interpretation of state law is not authoritative. *See, e.g., Meredith v. Winter Haven*, 320 U.S. 228, 237-238 (1943).

Congress or an established principle of general maritime law that properly governs the case. Similarly, state policies should not be permitted to interfere with fundamental aspects of maritime law, or to impair "the free flow of maritime commerce." *American Dredging, supra,* 114 S. Ct. at 990 (SOUTER, J., concurring).

American Dredging illustrates one "strong policy justifying the application of state law in a particular class of cases." Every sovereign has a strong interest in the application of its own rules of procedure in its courts. Thus the first principle permits state procedural rules to apply in state courts. *See generally* Robertson, *Displacement, supra,* part V.B.2. Other cases in which this Court has permitted the application of state law are similarly supported by strong policy reasons affecting a particular class of cases. In *Wilburn Boat,* for example, the Court specifically addressed the strong policy – endorsed by Congress – of leaving the regulation of insurance to the states to the extent possible. *See* 348 U.S. at 316-319.

In some cases, however, this court has permitted state law to apply in the absence of a strong policy reason supporting that result, typically because there was need for a rule of decision and federal maritime law did not provide one. The best illustration of this can be found in the court's wrongful death cases prior to *Moragne v. States Marine Lines, Inc.,* 398 U.S. 375 (1970). As discussed below, *see infra* at 19-20 & n.8, these cases should have been governed by the second principle.

2. When Federal Law Should Apply, Federal Courts Have a Duty to Formulate the General Maritime Law as Necessary. Although there have been notable

exceptions (such as the wrongful death cases prior to *Moragne, supra*), this Court has long recognized its power to formulate the general maritime law. In *Moragne* itself, for example, the Court created a remedy for maritime wrongful death – the principle of particular relevance in this case. But *Moragne* is not unique. Just last year, in *McDermott, Inc. v. AmClyde*, 511 U.S. ___, 114 S. Ct. 1461 (1994), the Court fashioned a maritime percentage-fault rule for crediting a defendant with a partial settlement between a plaintiff and another tortfeasor. Other prominent examples from the maritime personal injury field include *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974) (formulating a maritime right of contribution among tortfeasors), and *Kermarec, supra*, 358 U.S. at 629-632 (formulating a general maritime negligence rule without regard for the victim's licensee status).[7] As the Court declared earlier this year, "in admiralty . . . 'the Judiciary has traditionally taken the lead in formulating flexible and fair remedies.' " *City of Milwaukee v. Cement Division*, 515 U.S. ___, 115 S. Ct. 2091, 2095 (1995) (quoting *United States v. Reliable Transfer Co.*, 421 U.S. 397, 409 (1975)).

The power to formulate new rules of general maritime law carries with it a responsibility. As the late Judge John R. Brown explained,

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[7] Lower federal courts have also frequently recognized their power to fashion new rules of general maritime law. *See, e.g., Marastro Compania Naviera, S.A. v. Canadian Maritime Carriers, Ltd.*, 959 F.2d 49, 53 (CA5 1992) (fashioning a rule of liability for maritime trespass); *Byrd v. Byrd*, 657 F.2d 615, 621 (CA4 1981) (fashioning a maritime rule on interspousal immunity).

> [Article III's admiralty clause] is the only grant of jurisdiction in the Constitution that identifies an area of substantive law. Federal authority over admiralty and maritime law is addressed only in the Judicial Article. Oddly, the Constitution does not contain a similar grant of specific authority to Congress over admiralty and maritime law.
>
> The grant of judicial power to the federal courts in Article III of the Constitution also imposes the duty on admiralty judges to exercise that power. This duty requires that the admiralty judges declare the governing principles of maritime law.

Brown, *Admiralty Judges: Flotsam on the Sea of Maritime Law?* 24 J. MAR. L. & COM. 249, 251 (1993) (footnotes omitted). The existence of this duty is also implicit in a number of this Court's rulings. *See, e.g., Reliable Transfer, supra,* 421 U.S. at 409 (" 'Congress has largely left to this Court the *responsibility* for fashioning the controlling rules of admiralty law' ") (quoting *Fitzgerald v. United States Lines Co.,* 374 U.S. 16, 20 (1963)) (emphasis added); *Moragne, supra,* 398 U.S. at 396 (noting "this Court's traditional *responsibility* to vindicate the policies of maritime law") (emphasis added). By exercising their power and fulfilling this duty, the federal courts enable the general maritime law to develop and improve. If federal courts lacked this power, or declined to use it, maritime law would not keep pace with the changing needs of the maritime world.

When formulating new principles, the federal courts can look to a wide variety of sources. In *McDermott,* for example, the Court relied heavily on the American Law

Institute's *Restatement (Second) of Torts*. *See* 114 S. Ct. at 1465. One source, of course, could be state law. *See, e.g., Moragne, supra*, 398 U.S. at 390 (relying on state wrongful-death statutes to justify creation of maritime wrongful death remedy). But when a federal court "adopts" or "incorporates" state law into the general maritime law, the law so applied is now federal, and will apply as federal law in future cases. Furthermore, when a federal court looks to state law as a model for general maritime law, it is under no obligation to prefer the law of the state in which it sits or the law of the state with the closest connection to the case before it. *Cf. East River, supra*, 476 U.S. at 864 & n.2 (applying general maritime principles drawn from state and federal sources, but not looking specifically at the law of the forum state). The court should search for the most appropriate rule, even if only a minority of the states have adopted it. *Cf. Kermarec, supra*, 358 U.S. at 629-632 (formulating a general maritime law rule based on principles that state courts have not yet adopted).

Although this second principle permits federal courts to look to state law for inspiration, state law should never apply of its own force except as provided under the first principle. *See supra* at 15-16. In particular, state law should never apply simply to fill a "gap." If there is a gap in the general maritime law, the federal courts have a responsibility to provide the rule themselves, and should not defer to a different sovereign, which is not responsible for maritime law.[8] And state law should not apply

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[8] Prior to *Moragne*, this Court looked to state law to provide a wrongful death remedy. *See, e.g., The Tungus v. Skovgaard*, 358

simply because a maritime matter is only of "local" concern unless there is "a strong policy justifying the application of state law." Since *Executive Jet*, this Court's requirements for admiralty jurisdiction have ensured that a maritime case is never of merely local concern.

IV

Federal Maritime Law Should Supply the Rule of Decision in Maritime Personal Injury and Death Cases

Although *amici* urge the Courts to announce a test governing the choice between federal and state law in maritime cases generally, federal law should supply the rule of decision in maritime personal injury and death cases whatever approach the Court takes here.

A. The Proposed Principles

Under the proposed principles, it is self-evident that this case should be governed by the general maritime law. There is no "strong policy justifying the application of state law" to overcome the presumption in favor of federal law in maritime injury and death cases. The subject has long been at the core of admiralty practice, as is obvious from the high proportion of this Court's admiralty cases that involve personal injury and death. Even

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U.S. 588, 591 (1959); *The Hamilton*, 207 U.S. 398, 402-406 (1907). These cases, which have already been overruled – or at least superseded – by *Moragne*, were inconsistent with the second principle proposed here. The correct approach is the one taken by this Court in *Moragne:* formulation of a maritime wrongful death remedy to fill the gap.

in those cases where the courts have permitted state law to supply the substantive rule of decision in an injury or death case, it has not been based on a strong policy justifying the application of state law; rather, it has generally been based on the perceived need to fill a gap in the law or the conclusion that the federal interest was so weak that state law would not interfere with essential characteristics of maritime law.

Under the first principle, the district court below was correct to hold that federal maritime law applies. Furthermore, under the second principle the district court was correct to formulate new maritime rules to fill any gaps that it perceived in the existing general maritime law. The court of appeals should have reviewed those conclusions and decided whether it agreed with the district court's formulation of the general maritime law. This Court should now reverse the decision below and remand the case to the Third Circuit so that it can address the question certified by the district court.

B. The Gap Theory

Amici feel that the "gap" theory offers no useful guidance and that this Court should therefore reject it. *See supra* at 13-14. To the extent that the gap theory influences the Court's thinking on this case, however, the decision below must still be reversed. There simply is no gap here that could justify a federal court's applying state law.[9]

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[9] If the Court were to find that there is a gap in the general maritime law with respect to recreational boaters in territorial waters, and if the Court were to decide to turn to state law

Although this Court's decisions do not answer every question that might arise in the present litigation, *Moragne* clearly sets the parameters. Subsequent cases such as *Offshore Logistics, supra; Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978); and *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), offer further guidance. Moreover, this Court is not the sole source of federal maritime law. Other federal courts have faced questions virtually indistinguishable from those at issue here,[10] and their conclusions are all part of the general maritime law that the Third Circuit should have consulted before concluding "that admiralty law simply has not spoken to the factual situation of this case," Pet. at A-10, n.7, 40 F.3d at 628 n.7.

Even if there had been a gap in the general maritime law, the court of appeals should have formulated a rule to fill it. Many of the issues in this litigation are resolved by decisions of this Court. Most, if not all, of the remaining

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rather than filling the gap itself, the opinion should make clear how narrow the gap is. A broad opinion suggesting that it is appropriate to apply state law in maritime personal injury and death cases would cause great confusion outside the recreational boating context, particularly with respect to seamen and other maritime workers (such as longshore and harbor workers) where there is no suggestion that serious gaps in the law exist. *Cf. infra* note 11.

[10] The most notable example of another federal court's answers to the questions at issue here is found in *Wahlstrom, supra*, 4 F.3d at 1089-94, a virtually indistinguishable case. *See also, e.g., Mink, supra*, 29 F.3d at 1547-49; *Sutton v. Earles*, 26 F.3d 903, 914-917 (CA9 1994); *Kelly v. Panama Canal Commission*, 26 F.3d 597, 601-602 (CA5 1994); *Preston v. Frantz*, 11 F.3d 357, 358 (CA2 1993) (per curiam), *cert. dismissed*, 115 S. Ct. 31 (1994); *Walker v. Braus*, 995 F.2d 77, 81-82 (CA5 1993); *Barbe v. Drummond*, 507 F.2d 794, 797-800 (CA1 1974).

questions have been addressed by other federal courts. The Third Circuit should have supplied any new principles that it still thought necessary rather than accepting a state-federal patchwork that would create confusion and undermine the uniformity that is so essential to maritime law. Looking to state law to fill any gaps in this context is entirely inconsistent with the underlying rationale of both *Moragne* and *Miles*.

C. The Maritime-but-Local Theory

Amici feel that the "maritime-but-local" theory offers no useful guidance and that this Court should therefore reject it. *See supra* at 14. To the extent that the theory influences the Court's thinking on this case, however, the decision below must still be reversed. A fatal collision between two vessels in the navigable ocean waters is not simply of local concern.[11] Indeed, the Court implicitly recognized this conclusion in *Foremost, supra,* when it held that a collision between two recreational boats in a shallow Louisiana river "seldom, if ever, used for commercial traffic," 457 U.S. at 670 n.2, was within the admiralty jurisdiction. The Court's entire rationale was based

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[11] If the Court were to find that a recreational boating accident is simply of local concern, the opinion should make clear that this analysis would not extend to maritime personal injury and death cases outside the recreational boating context, particularly cases involving seamen and other maritime workers (such as longshore and harbor workers). *Cf. supra* note 9. Seamen and other maritime workers are involved in the maritime commerce that is at "the heart of admiralty jurisdiction." *Sisson, supra,* 497 U.S. at 362 ("protecting commercial shipping is at the heart of admiralty jurisdiction").

on the need for a uniform, maritime remedy – the federal remedy of the general maritime law. *See id.* at 674-677. Its reasoning would have been entirely nonsensical if state law had been intended to provide the rule of decision on remand.

V

The Court Should Resolve the First Question Presented in the Petition Regardless of Its Ruling on the Procedural Question Posed in the Order Granting Certiorari

In the order granting certiorari, the Court requested the parties to brief and argue a question concerning the scope of the courts of appeals' authority under 28 U.S.C. § 1292(b). *Amici* have no interest in the resolution of this issue, and thus express no view on the proper answer to the question. Whatever the resolution may be, however, *amici* respectfully urge this Court to answer the first question presented in the petition.

The first question raises an important issue not only to the parties but to the entire maritime industry. *See supra* at 3. The current state of the law is unsatisfactory. *See supra* at 10-11 & n.2. The Court should therefore take this opportunity to establish a clear and predictable test for determining whether federal or state law governs a particular aspect of a maritime case.

If the Court concludes that the Third Circuit had jurisdiction over the district court's entire order, there will be no bar to reaching question 1. But if the Court concludes that the Third Circuit's role should have been limited to answering the controlling questions of law, it

might be tempting to vacate the decision below and remand for further proceedings without ruling on question 1. This would be a particularly wasteful use of judicial resources.

If the Court vacated and remanded without answering question 1, the Third Circuit would face a difficult choice. It could either (1) answer questions that would, in its view, ultimately prove irrelevant or (2) reconsider its prior decision under FED. R. APP. P. 5(a) to accept the appeal. In either case, the district court, knowing that the Third Circuit disagreed with its decision to apply federal law, would face another awkward choice when the case returned for trial. It could (1) conduct the trial under federal law, knowing that its judgment was likely to be reversed if the court of appeals adhered to its views on a second appeal, (2) reconsider its choice-of-law ruling based on its knowledge of the vacated opinion, or (3) certify a second appeal under 28 U.S.C. § 1292(b), this time identifying the choice between state and federal law as the controlling question. Under any scenario, the case would eventually return to the court of appeals, which could then adhere to its prior opinion, and the question could then return to this Court (if four members still considered the issue certworthy). The question would be no easier to answer on the second attempt, but the parties would be much poorer for the experience and the courts below would have wasted considerable time and energy.

CONCLUSION

The decision of the Third Circuit should be reversed on the first question presented in the petition.

Respectfully submitted,

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July 26, 1995

(8)

No. 94-1387

Supreme Court, U.S.
FILED
JUL 26 1995
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

YAMAHA MOTOR CORPORATION, U.S.A. and YAMAHA MOTOR COMPANY, LTD.,

Petitioners,

v.

LUCIEN B. CALHOUN and ROBIN L. CALHOUN INDIVIDUALLY and as ADMINISTRATORS OF the Estate of Natalie K. Calhoun, Deceased,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICUS CURIAE* OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the General Maritime Law of the United States since this Court's decision in *Moragne v. States Marines Lines* provides for wrongful death and survival remedies in cases involving the death of recreational boaters on the navigable waters of the United States.

2. Whether, if *Moragne* did not provide wrongful death and survival remedies for recreational boaters, should such remedies be fashioned as part of the general maritime law to the exclusion of state law.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
BRIEF IN SUPPORT OF PETITIONER	1
NATURE OF MLA'S INTEREST	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
THE GENERAL MARITIME LAW OF THE UNITED STATES AND NOT STATE LAW MUST PROVIDE THE REMEDY FOR WRONGFUL DEATH AND SURVIVAL ACTIONS INVOLVING RECREATIONAL BOATERS ON THE NAVIGABLE WATERS OF THE UNITED STATES	4
I.	
THE PRINCIPLE OF UNIFORMITY IN THE GENERAL MARITIME LAW OF THE UNITED STATES	4
A. Constitutional Basis For Uniformity	4
B. The Process For Determining The Choice Of Law	7
II.	
THIS COURT HAS DEVELOPED A BODY OF MARITIME TORT PRINCIPLES WHICH OCCUPY AND GOVERN ALL INJURIES AND DEATH ON NAVIGABLE WATERS	12
A. This Court's Decision In *Moragne v. States Marine Lines* Created A General Maritime Remedy For Wrongful Death	12

B. The Further Development Of Maritime Tort Law 14

C. The Application Of Maritime Jurisdiction To Recreational Boating And The Need For Uniformity 16

III.

THE USE OF STATE WRONGFUL DEATH AND SURVIVAL REMEDIES WOULD RESULT IN IRRECONCILABLE AND UNJUST OUTCOMES FOR SIMILARLY SITUATED PERSONS 17

A. Drowning In The Sea Of State Law 17

B. The Nature Of State Wrongful Death And Survival Remedies And The Likelihood Of Conflict 18

C. State-Maritime Law Conflicts 23

D. The Need For A Judicial Pronouncement Of A Uniform Maritime Remedy 26

IV.

IS THIS ANOTHER WAY TO CIRCUMVENT ADMIRALTY JURISDICTION FOR RECREATIONAL VESSELS 28

CONCLUSION 29

TABLE OF AUTHORITIES

Cases	PAGE
American Dredging Co. v. Miller, 510 U.S. ____, 114 S. Ct. 981 (1994)	2, 6, 7, 10
Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973)	2
Azzopardi v. Ocean Drilling & Exploration Co., 742 F.2d 890 (5th Cir. 1984)	13
Barbe v. Drummond, 507 F.2d 794 (1st Cir. 1974)	13
Chick Kam Choo v. Exxon Corp., 486 U.S. 140 (1988)	2
Debrino v. Benaquista & Benaquista Realty, Inc., 522 N.Y.2d 980, 135 A.D.2d 1044 (3d Dpmnt. 1987)	20
Delevio v. Boit, 7 F. Cas. 418 (C.C.D. Mass. 1815)	5
East River S.S. Corp. v. Transamerica Delaval Inc., 476 U.S. 858 (1986)	6, 8, 9, 24
Edynak v. Atlantic Shipping, Inc., 562 F.2d 515 (3d Cir. 1977)	28
Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 429 (1972)	6, 8, 28
Foremost Ins. Co. v. Richardson, 457 U.S. 668 (1982)	16, 28
Green v. Vantage S.S. Corp., 466 F.2d 159 (4th Cir. 1972)	13
Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., ____ U.S. ____, 115 S. Ct. 1043 (1995)	2, 28, 29
Kelly v. Smith, 485 F.2d 520 (5th Cir. 1973), *cert. denied*, 416 U.S. 969 (1974)	28

Kermarec v. Compagnie Gen. Transatlantique, 358 U.S. 625 (1959) 9, 14

Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920) 8

Kossick v. United Fruit Co., 365 U.S. 731 (1961) . 17

Lyon v. Ranger III, 858 F.2d 22 (1st Cir. 1988) . 13

Matter of S/S Ilelena, 529 F.2d 744 (5th Cir. 1976) . 13

Miles v. Apex Marine Corp., 498 U.S. 19 (1990) 3, 9, 13, 15

Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978) 8, 9, 14, 15

Moragne v. Marine Lines, Inc., 398 U.S. 375 (1970) 3, 9, 12-13, 14, 15, 16, 18, 23, 26, 29

Nelson v. United States, 639 F.2d 469 (9th Cir. 1980) 13

Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986) 2, 8

Price v. Price, 929 F.2d 131 (4th Cir. 1991) ... 28

Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) . 2

Romero v. International Terminal Operating Co., 358 U.S. 354 (1959) 4

Sea Land Servs., Inc. v. Gaudet, 414 U.S. 573 (1974) 6, 7, 9, 14

Sinclair v. Soniform, Inc., 935 F.2d 599 (3d Cir. 1991) 16, 28

Sisson v. Ruby, 497 U.S. 358 (1990) ... 2, 16, 25, 28, 29

Smith v. Knowles, 642 F. Supp. 1137 (D. Md. 1986) 28

Spiller v. Thomas M. Lowe, Jr. & Assoc., 466 F.2d 903 (8th Cir. 1972) 14

THE HARRISBURG, 119 U.S. 199 (1886) 12, 24

THE LOTTAWANNA, 88 U.S. (21 Wall.) 558 (1875) .. 6

THE TUNGUS v. Skovgaard, 358 U.S. 588 (1959) .. 24, 25

United States v. Reliable Transfer Co., 421 U.S. 397 (1975) 8, 9, 14, 15, 19, 24

Wahlstrom v. Kawasaki Heavy Indus., Ltd., 4 F.3d 1084 (2d Cir. 1993), *cert. denied*, ____ U.S. ____, 114 S. Ct. 1060 (1994) 13

Walker v. Braris, 995 F.2d 77 (5th Cir. 1993) 13

Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1955) 26-27

Constitution

Art. III, § 2 ..... 4, 29

Statutes

9 U.S.C. §§ 1-16 2

33 U.S.C. §§ 901-950 7

33 U.S.C. §§ 1251-1376 2

33 U.S.C. §§ 2001-2073 ..... 2, 6

46 U.S.C. app. § 688 ..... 7, 12

46 U.S.C. §§ 761-768 12

46 U.S.C. § 763a 18, 24

46 U.S.C. §§ 1300-1315 2

46 U.S.C. § 4301 *et seq.* 6

735 ILCS 5/2-1115.1(a) (1995) 19

740 ILCS 180/2 (1995) 19, 20

Cal. Civ. Proc. § 377.34 (1992) 22
Cal. Civ. Proc. § 340 (1982) 22
Cal. Civ. Code § 1714 (1978) 22
Code Me. R. 14 § 156 21
Conn. Gen. Stat. Ann. § 52-555 (1991) 20, 21
Conn. Gen. Stat. Ann. § 52-572h(b) (1991) 21
Ind. Code § 22-3-9-6 (1991) 19
Ind. Code § 34-1-1-2 (1983) 19, 20
Ind. Code § 34-4-33-3 (1995) 19
Ind. Code § 34-4-33-4 (1995) 19
La. Civ. Code Ann. Art. 2315.2 (1995) 21
La. Civ. Code Ann. Art. 2323 (1995) 21
La. Rev. Stat. Ann. § 13:5106 (1991) 21
Me. Rev. Stat. Ann. tit. 18-A, § 2-804(b) (1981) .. 20
Mich. Comp. Laws § 600.2922 (1986) 20
Mich. Comp. Laws § 600.2949 (1986) 20
N.Y. Civ. Prac. L. & R. Art. 1, § 16 (1939) 20
N.Y. Civ. Prac. L. & R. § 1411 (1976) 21
Or. Rev. Stat. § 18.470 (1993) 22
Or. Rev. Stat. § 30.020 (1991) 22
P.R. Laws Ann. tit. 31, § 5298 (1991) 22
P.R. Laws Ann. tit. 31, § 5141 (1991) 23
Pa. Cons. Stat. Ann. § 7102 (1982) 23
Pa. Cons. Stat. Ann. § 8301 (1982) 23
Pa. Cons. Stat. Ann. § 8553 (1982) 22
Tx. Civ. Prac. & Rem. Code Ann. § 101.023 (1986) . 21

Tx. Civ. Prac. & Rem. Code Ann. § 16.003 (1986) . 21

Tx. Civ. Prac. & Rem. Code Ann. § 33.001 (1995) . 21

Wash. Rev. Code § 4.16.130 (1988) 22

Wash. Rev. Code § 4.20.020 (1985) 22

Wash. Rev. Code § 4.22.005 (1981) 22

Wis. Stat. Ann. § 893.54 (1983) 20

Wis. Stat. Ann. § 895.04(4) (1995) 19

Wis. Stat. Ann. § 895.045 (1995) 19

Regulations

33 C.F.R. ch. 1 2

Other Authorities

1 *Benedict On Admiralty*, § 104 (1995) 6

1 *Benedict On Admiralty*, § 109 (1995) 9

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Gilmore & Black, *The Law of Admiralty*, pp. 463-68, (2d ed. 1975) 10

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Warren J. Marwedel, *Admiralty Jurisdiction and Recreational Craft Personal Injury Issues*, 68 TUL. L. REV. 423 (1994) 16

Conventions

28 U.S.T. 3459, 1050 U.N.T.S. 16, *amended* by T.I.A.S. No. 10672, 1143 U.N.T.S. 346 2

No. 94-1387

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF *AMICUS CURIAE* OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES IN SUPPORT OF PETITIONERS

The Maritime Law Association of the United States ("MLA") respectfully files this brief *amicus curiae* in support of Petitioners Yamaha Motor Corporation, U.S.A. and Yamaha Motor Company, Ltd. and requests this Court to reverse the decision of the United States Court of Appeals for the Third Circuit (the "Court of Appeals"). Petitioners and Respondents have consented in writing to the filing of this brief by the MLA and the parties' written consents have been filed with the Clerk of this Court pursuant to Rule 37.3 of this Court.

NATURE OF THE MLA'S INTEREST

MLA has a strong interest in this case because it involves important issues of maritime law, and because the Court's decision may substantially affect the uniformity of maritime law. MLA is a nationwide bar association founded in 1899 and incorporated in 1993. Its membership of approximately 3,600 includes attorneys, judges, law professors and others interested in maritime law. It is affiliated with the American Bar Association ("ABA") and is represented in ABA's House of Delegates.

MLA's attorney members, most of whom are specialists in admiralty law, represent all maritime interests—shipowners, charterers, cargo owners, shippers, forwarders, port authorities, seamen, longshoremen, stevedoring companies, passengers, marine insurance underwriters and brokers and all other maritime plaintiffs and defendants.

MLA's purposes are stated in its Articles of Incorporation:

> The objectives of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, *to promote uniformity in its enactment and interpretation*. . . .

(Emphasis added).

The MLA has sponsored a wide range of legislation dealing with maritime matters, including the Carriage of Goods by Sea Act and the Federal Arbitration Act. 46 U.S.C. §§ 1300-1315; 9 U.S.C. §§ 1-16. The MLA also has cooperated with congressional committees in the formulation of other maritime legislation.[1]

On April 25, 1975, the MLA passed a resolution urging congressional committees "that nationwide and, in fact, world-wide uniformity in the Maritime Law is highly desirable, not only from the standpoint of those involved with maritime commerce but from that of the public as well."[2] A substantially identical resolution was adopted by the American Bar Association in 1976. The MLA reaffirmed this resolution in 1986.[3]

In furtherance of its uniformity of maritime law policy, MLA has filed a number of *amicus* briefs accepted by this Court[4] in important issues of maritime law where the

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[1] *E.g.*, 1972 Water Pollution Control Act Amendments, 33 U.S.C. §§ 1251-1376 (1988); implementation of the 1972 Convention for Prevention Collisions at Sea, 28 U.S.T. 3459, 1050 U.N.T.S. 16, *amended* by T.I.A.S. No. 10672, 1143 U.N.T.S. 346, *reprinted in* 6 BENEDICT ON ADMIRALTY, Doc. No. 3-4 (7th rev'd ed. 1993) [BENEDICT] at p. 3-34.1; *See* 33 C.F.R. ch. 1, subch. D, Special Note, at 160 (1987); Inland Navigation Rules Act of 1980, 33 U.S.C. §§ 2001-2073.

[2] MLA Minutes, MLA Doc. No. 588 at 6397-98 (1975).

[3] MLA Minutes, MLA Doc. No. 669 at 8769 (1986).

[4] *E.g.*, *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, ___ U.S. ___, 115 S. Ct. 1043 (1995); *American Dredging Co. v. Miller*, 510 U.S. ___, 114 S. Ct. 981 (1994); *Sisson v. Ruby*, 497 U.S. 358 (1990); *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973). For a more comprehensive listing, see MLA Report, MLA Doc. No. 671 at 8862-63 (1987).

Court's decision would substantially affect the uniformity of maritime law. Such a situation exists in this case.

The maritime jurisdiction of federal courts is provided by the Constitution and is the cornerstone upon which uniformity of U.S. maritime law has been built. If maritime interests were governed by the laws of the fifty states, it would create an unworkable patchwork of laws that would defeat uniformity and inhibit the free flow and use of navigable waters.

SUMMARY OF ARGUMENT

The general maritime laws of the United States, and not the laws of the fifty states, must provide the remedies for wrongful death and survival involving recreational boaters on the navigable waters of the United States. This Court decided in *Moragne v. Marine Lines, Inc.*, 398 U.S. 375 (1970), that there is a wrongful death remedy in the general maritime law "for death caused by violation of maritime duties" *Id.* at 409. The fashioning of that remedy was most recently reaffirmed in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990).

This Court should declare that *Moragne* was not limited to its facts, longshoremen and seamen, but created a general maritime wrongful death remedy for all persons falling within maritime jurisdiction. Alternatively, a wrongful death and survival remedy for torts causing death to recreational boaters should be fashioned by the Court in keeping with the principle of uniformity. Uniformity is required in this area because the application of various and diverse state remedies would result in unjustifiable and hopeless conflicts in substantive law among the states and between the states and maritime law for similarly situated plaintiffs within the maritime jurisdiction of the United States.

ARGUMENT

THE GENERAL MARITIME LAW OF THE UNITED STATES AND NOT STATE LAW MUST PROVIDE THE REMEDY FOR WRONGFUL DEATH AND SURVIVAL ACTIONS INVOLVING RECREATIONAL BOATERS ON THE NAVIGABLE WATERS OF THE UNITED STATES.

I.

THE PRINCIPLE OF UNIFORMITY IN THE GENERAL MARITIME LAW OF THE UNITED STATES.

A. Constitutional Basis For Uniformity.

Article III, Section 2 of the U.S. Constitution grants judicial power to "all cases of admiralty and maritime jurisdiction." According to this Court, the Constitution establishes three different grants of power:

> (1) It empowered Congress to confer admiralty and maritime jurisdiction on the "Tribunals inferior to the supreme Court" which were authorized by Art. I, § 8, cl. 9. (2) It empowered the federal courts in their exercise of the admiralty and maritime jurisdiction which had been conferred on them, to draw on the substantive law "inherent in the admiralty and maritime jurisdiction," [citation omitted], and to continue the development of this law within constitutional limits. (3) It empowered Congress to revise and supplement the maritime law within the limits of the Constitution.

Romero v. International Terminal Operating Co., 358 U.S. 354, 360-61 (1959).

Since the early days of this nation, the constitutional grant of admiralty and maritime jurisdiction to the federal courts has been broadly construed. Justice Story noted that the addition of the term "maritime" in the constitutional grant of power was purposeful, and the jurisdiction was broader than just the term "admiralty" as it existed under English law and called for the most liberal interpretation:

> [T]he Constitution not only confers admiralty jurisdiction, but the word "maritime" is super added, seemingly *ex industria* to remove every latent doubt. "Cases of maritime jurisdiction" must include all maritime contracts, torts and injuries, which are in the understanding of the common law, as well as of the admiralty, *"causae civiles et maritime."* In this view there is a peculiar propriety in the incorporation of the term "maritime" into the Constitution. The disputes and discussions, respecting what the admiralty jurisdiction was, could not but be well known to the framers of that instrument. [Citation omitted]. One party sought to limit it by locality, another by the subject matter. It was wise, therefore, to dissipate all question by giving cognizance of all "cases of maritime jurisdiction," or, what is precisely equivalent, of all maritime cases.
>
> . . . [T]he language of the Constitution will therefore warrant the most liberal interpretation. . . .
>
> The advantages resulting to the commerce and navigation of the United States, from a uniformity of rules and decisions in all maritime questions, authorized us to believe the national policy, as well as juridical logic, require the clause of the Constitution to be so construed, as to embrace all maritime contracts, torts and injuries, or, in other words, to embrace all those causes, which originally and inherently belonged to the admiralty, before any statutable restriction.

Delevio v. Boit, 7 F. Cas. 418, 442-43 (C.C.D. Mass. 1815).

The justification for granting federal judicial power over admiralty and maritime cases was, at the time of the public debate on the Constitution, found in the "laws of nations" and "public peace." As noted by Alexander Hamilton in *The Federalist No. 80*:

> . . . The most bigoted idolizers of state authority have not thus far shown a disposition to deny the national judiciary the COGNIZANCE of Maritime causes. These

> so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace. The most important part of them are by the present confederation submitted to federal jurisdiction.

The Federalist No. 80, at 538 (Alexander Hamilton), (F. Cooice ed., 1961).

This Court in *THE LOTTAWANNA*, clearly stated that the Article III provision intended to create ". . . a system of law coextensive with, and operating uniformly in, the whole country." 88 U.S. (21 Wall.) 558, 575 (1875), *cited in American Dredging Co. v. Miller*, 510 U.S. ___, 114 S. Ct. 981, 987 (1994). The development and application of a substantive body of uniform laws in all situations in which there is admiralty jurisdiction, follows from the principal of uniformity. "With admiralty jurisdiction comes the application of substantive admiralty law." *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 864 (1986); *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 255 (1972).

The importance of uniformity arises from the commonality of those factors and conditions which are found in the realm of the maritime. These include a common historical basis,[5] the perils associated with the seas and weather, the juridical personality of the vessel, the similarity of risks in the maritime venture, the federal statutory rules governing navigation on the territorial waters;[6] and governing vessel safety,[7] the special solicitude shown to maritime workers by

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[5] 1 *Benedict On Admiralty*, § 104 (1995).

[6] *See, e.g., Sea Land Servs., Inc. v. Gaudet*, 414 U.S. 573 (1974); *Inland Navigational Rules Act of 1980*, 33 U.S.C. §§ 2001-2073.

[7] Federal Boat Safety Act, 46 U.S.C. § 4301 *et seq*.

both the courts[8] and Congress[9] and the particular characteristics associated with maritime commerce. Maritime substantive law was developed to respond to the special needs of the maritime world.

Therefore, the principle of uniformity does not exist solely in a vacuum as a self-serving concept without any basis in reality. The courts have implicitly recognized this reality in the situs and nexus requirements for maritime jurisdiction which are themselves factors and conditions which require maritime substantive rules. Those factors and conditions do not change from state to state or on some other venue related basis but are themselves uniform. Maritime law recognizes this and has developed a set of uniform laws to govern these situations.

B. The Process For Determining The Choice Of Law.

The attention to the principle of uniformity evidences the importance attached to it, and is a recognition of the fact that this principle deserves more than lip service as suggested by the Court of Appeals below. Petition at A-10. Highlighting the difficulty of adhering to the principle of uniformity does not diminish the vital importance of it to the maritime jurisprudence of this country.

It is true that it is not always easy to discern a bright line "separating permissible from impermissible state regulation in [this Court's] admiralty jurisprudence." *American Dredging Co. v. Miller*, 510 U.S. ___, 114 S. Ct. 981, 987 (1994). However, what is apparent from this

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[8] *See, e.g., Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 577 (1974).

[9] *The Jones Act*, 46 U.S.C. app. § 688; *The Longshore and Harbor Workers' Compensation Act*, 33 U.S.C. §§ 901-950.

Court's jurisprudence on the principle of uniformity is the process by which this Court arrives at a determination of what law should apply. There are essentially four factors to the choice of law process one can discern from this Court's decisions.

First, with admiralty jurisdiction comes the application of substantive maritime law. *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 864 (1986) (*citing Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 255 (1972)). There is a presumption of the application of maritime law when the jurisdictional inquiry has been satisfied. The reason for this is the same as the justification for uniformity: the locus and nexus of the occurrence requires the specialty of the maritime law for resolution. If substantive admiralty law is not applied, why bother with admiralty jurisdiction.

Second, the Courts look to applicable federal statutes or, "absent a relevant statute, the general maritime law, as developed by the judiciary. . . ." *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 864 (1986) (*citing United States v. Reliable Transfer Co.*, 421 U.S. 397, 409 (1975) and *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 160-161 (1920)). *See generally Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 626 (1978); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 233 (1986). Federal statutory laws are given deference by the Court.[10] The contribution of congressional enactments to the maritime area is quite evident

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[10] ". . . [W]e have no authority to substitute our views for those expressed by Congress in a duly enacted statute." *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 626 (1978). "[We] defer to Congress' purpose in making a uniform provision for recovery for wrongful deaths on the high seas . . ." *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 233 (1986).

in the many laws dealing with maritime issues.[11] Absent any legislative enactments, the controlling rules of admiralty as developed by the judiciary apply.

In the absence of statutory law or general maritime law, the Court fashions general maritime law from existing maritime law, federal maritime statutes and state sources. *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 864-65 (1986) (recognizing products liability including strict liability); *Kermarec v. Compagnie Gen. Trans at Catiques*, 358 U.S. 625, 630 (1959) (fashioning a shipowner's duty of reasonable care); *Moragne v. Marine Lines, Inc.*, 398 U.S. 375 (1970) (creating a wrongful death remedy in general maritime law); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 624-25 (1978); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990).

The cases in which this Court has fashioned remedies may be generally divided into two categories: those where the court has developed a body of principles;[12] and those where the Court has felt a need to resolve anomalies or discrepancies in the law.[13] Obviously, again, the jurisdictional locus and nexus are a necessary and outcome determinative pretext for the fashioning of the law.

Finally, when reviewing state statutes which impact on maritime activities, this Court determines whether the state statutes "contravenes an applicable act of Congress"

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[11] 1 *Benedict on Admiralty*, § 109 (1995).

[12] *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 864-65 (1986); *Kermarec v. Compagnie Gen. Trans at Catiques*, 358 U.S. 625, 630 (1959); *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975); *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990).

[13] *Moragne v. Marine Lines, Inc.*, 398 U.S. 375 (1970); *Sea Land Servs., Inc. v. Gaudet*, 414 U.S. 573 (1974).

or "works material prejudice to characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations". A state statute which does, must yield to a general maritime rule of law.

This fourth characteristic includes two scenarios. The first is a state statute which regulates a specific activity already regulated by existing maritime law. The second is the situation where there is an applicable state statute, but no specific general maritime rule of law or statute and the state statute arguably may still conflict with the unique characteristics of the general maritime law. It is in this latter area where this Court has had to determine the necessity of fashioning an appropriate general maritime remedy where none exists and in spite of the existence of a state remedy.

As stated by this Court[14] and by commentators,[15] it is difficult to ascertain when a maritime rule should be fashioned, or, stated differently, when an applicable state statute should be viewed as violative of the unique characteristic features of maritime law. Two points do surface, however, which are most important in this issue. First, the existence of admiralty jurisdiction creates the need to examine any state statute in the overall context of general maritime law. Second, a general maritime remedy must be fashioned when one does not exist, if there are characteristic features of maritime law which otherwise would be vio-

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[14] *American Dredging Co. v. Miller*, 510 U.S. ___, 114 S. Ct. 981 (1994).

[15] *See* Gilmore & Black, *The Law of Admiralty*, pp. 463-68, (2d ed. 1975) where the authors suggest a "balancing test" best explains the Court's decisions on this point without providing any real guidance on the issue.

lated by the use of the state law. Indeed, both points arise from the principle of uniformity enunciated by this Court as a desired feature in the general maritime law.[16]

The appropriate and proper conclusion to be made is that the process for determining the choice of law is driven by the unique nature of maritime interests and that uniformity is the guiding principle. The substantive law may be fashioned from federal statutes, state statutes, common law or existing maritime law always guided by the principle of uniformity. And, even in the review of a state law which impacts maritime interests, it is always necessary to be mindful of the unique nature of maritime interests.

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[16] The Court of Appeals below developed a "displacement analysis" to determine the choice of law issue. The "displacement analysis" of the Court of Appeals is fundamentally flawed for three reasons. First, the Court equates the preemption analysis applicable to federal-state statute conflicts issues with the maritime choice of law rules when the latter rests on admiralty jurisdiction and the former relies on a federal-state statutory conflict. Second, the analysis fails to place proper emphasis on the importance of fashioning law in an area already occupied by maritime substantive law. Third, the analysis seems to suggest that because state law may be a source from which to fashion an appropriate maritime rule, state law could be used in and of itself without the step of inclusion into the general maritime law. "Thus, because it makes little practical difference as to whether the general maritime law has incorporated state law or whether state law provides a rule of decision of its own force, we simply refer to the problem as 'displacement of state law' ". Petition at A-10 (footnote omitted). It is difficult to imagine after the use of state law along with existing maritime law in *Moragne*, *East River* and *Miles* to fashion a *maritime* remedy how the Court of Appeals could have reached such a strange conclusion. The Court of Appeals' blurring of this important distinction also will lead to the "displacement" of *existing* substantive maritime law. *See* Discussion, *infra*, pp. 23-26.

II.

THIS COURT HAS DEVELOPED A BODY OF MARITIME TORT PRINCIPLES WHICH OCCUPY AND GOVERN ALL INJURIES AND DEATH ON NAVIGABLE WATERS.

A. This Court's Decision In Moragne v. States Marine Lines Created A General Maritime Remedy For Wrongful Death.

This Court's decision in *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), was a landmark decision because it reversed the decision in *THE HARRISBURG*, 119 U.S. 199 (1886), and fashioned a wrongful death remedy for the general maritime law. *Moragne* is noteworthy for the principle of uniformity and the discussion in this case for several reasons.

First, this Court took notice of the special characteristics of maritime law. *Moragne*, 398 U.S. at 386-87. Second, the general development of state wrongful death remedies and federal wrongful death remedies was acknowledged as evidence of a policy favoring the creation of such a remedy. *Id.* at 390-93. Third, this Court further recognized that Congress "has given no affirmative indication of an intent to preclude the judicial allowance of a remedy for wrongful death . . . " *Id.* at 393. Fourth, Congress enacted Death on the High Seas Act (DOHSA), 46 U.S.C. §§ 761-768 and the Jones Act, 46 U.S.C. app. § 688, providing for wrongful death remedies and consequently evidencing congressional intent. Fifth, incongruities had developed between the decisional and the statutory law regarding wrongful death which could no longer be justified. *Moragne*, 398 U.S. at 395-96.

All of the above factors formed the basis for the repudiation of *THE HARRISBURG*, the affirmation of the principal of uniformity and the rejection of state remedies:

> Our recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts.

Id. at 401.

The wrongful death remedy fashioned by this Court in *Moragne* was for the general maritime law and is not, as the Court of Appeals below has stated, limited to longshoreman. Petition at A-33-34. Legal scholars and almost all of the other circuits have concurred in this interpretation.[17]

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[17] *See Matter of S/S Ilelena*, 529 F.2d 744, 753 (5th Cir. 1976) ("because a persuasive rational for the enforcement of state wrongful death statutes in admiralty courts no longer exists after *Moragne*, we hold that the wrongful death remedy provided by that case precludes recognition in admiralty of state statutes."); *Nelson v. United States*, 639 F.2d 469, 473 (9th Cir. 1980) ("We hold that the need for uniformity in maritime wrongful death actions requires extension of *Moragne* to cover claims based on negligence, to the exclusion of state wrongful death statutes."); *Miles v. Apex Marine, Corp.*, 498 U.S. 19 (1990) (the uniform law of admiralty preempts state wrongful death statutes in territorial waters); *Barbe v. Drummond*, 507 F.2d 794 (1st Cir. 1974) (recognizing a federal maritime survival action similar to *Moragne*); *Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4 F.3d 1084 (2d Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1060 (1994) (state law claims dismissed in favor of federal maritime law); *Lyon v. Ranger III*, 858 F.2d 22 (1st Cir. 1988) (recovery consistent with standard *Moragne* wrongful death and survival action); *Green v. Vantage S.S. Corp.*, 466 F.2d 159 (4th Cir. 1972) (*Moragne* wrongful death action displaces state statutes); *Walker v. Braris*, 995 F.2d 77 (5th Cir. 1993) (damages limited to those recoverable under a *Moragne* death cause of action); *Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890 (5th Cir. 1984) (under principles announced in *Moragne*, general maritime law includes a survival action permitting recovery of decedent's pre-death dam-

(continued...)

B. The Further Development Of Maritime Tort Law.

Moragne does not stand alone in the jurisprudence dealing with uniformity in maritime tort law. Other recent cases before and after evidence continuing activity in the area of substantive maritime tort law.

Kermarec v. Compagnie Gen. Transatlantique, 358 U.S. 625, 630 (1959) developed the shipowner's duty of exercising reasonable care, noting the development in the common law in fashioning a single standard of care. *Sea Land Servs., Inc. v. Gaudet*, 414 U.S. 573 (1974), picked up where *Moragne* left off in the fashioning of a nonstatutory wrongful death remedy. In *Gaudet*, the majority and dissent again looked to the policy evidenced by state and federal law to argue for the proper parameters of the remedy.

In *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), this Court read DOHSA to provide the elements of damages in a wrongful death on the high seas. While the decision has been read as an example of this Court failing to support uniformity, it is better interpreted to show the deference paid to specific federal maritime statutory schemes in determining maritime tort damages. Thus, while this Court fashioned the elements of damages for wrongful death on territorial waters in *Gaudet* by reference to statutory law and the uniformity policy of the maritime law, it would not upset the specific federal statutory scheme in the name of uniformity. Most importantly, this Court reaffirmed the

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[17] (...continued)
ages); *Spiller v. Thomas M. Lowe, Jr. & Assoc.*, 466 F.2d 903 (8th Cir. 1972) (general maritime wrongful death and survival actions exist after *Moragne*); Gilmore & Black, *The Law of Admiralty* pp. 369-70 (2d ed. 1975) (a treatise previously cited with approval by this Court in *United States v. Reliable Transfer Co.*, 421 U.S. 397, 405, 410 (1975)); Schoenbaum, *Admiralty and Maritime Law*, pp. 240-41 (1987).

value of uniformity, but minimized the threat in the context of DOHSA laws. *Mobil Oil Corp.*, 436 U.S. at 624.

If there was any doubt as to how to interpret the inclusiveness of the wrongful death remedy in *Moragne*, then the decision in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), should have laid that doubt to rest. *Miles* confirmed that *Moragne's* general maritime cause of action for wrongful death applies to seamen which in essence confirmed that *Moragne* should not be so narrowly interpreted to apply only to longshoremen.

Miles also is noteworthy for two other reasons. First, it reconfirmed the willingness of this Court to fashion tort remedies consistent with existing maritime law. Second, this Court acknowledged (although it did not rule on) the federal and state statutory support for a right of survival and the decisions of various lower courts to use the Jones Act and the many state survival statutes to fashion a general maritime right of survival. *Miles*, 498 U.S. at 33-34.

The inescapable conclusion to be drawn from this line of cases is that this Court has totally occupied the maritime tort area and that it is willing to fashion tort remedies for the general maritime law consistent with the existing federal statutes in recognition of the principal of uniformity and has taken the lead in developing fair and flexible remedies. *United States v. Reliable Transfer Co.*, 421 U.S. 397, 409 (1975). Thus, to the extent the Court of Appeals is correct in its narrow reading of *Moragne*, this Court should now extend the general maritime wrongful death remedy to the recreational boating area.[18]

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[18] This Court's activities in the maritime tort area between 1950 and 1970 have been characterized by Gilmore and Black as revolutionary. Gilmore & Black, *The Law of Admiralty* § 6-61, p. 468

(continued...)

C. The Application Of Maritime Jurisdiction To Recreational Boating And The Need For Uniformity.

An important and relevant development in this Court's maritime jurisprudence since *Moragne* has been the application of maritime jurisdiction to recreational boating. *See Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982); *Sisson v. Ruby*, 497 U.S. 358 (1990). *See generally* Warren J. Marwedel, *Admiralty Jurisdiction and Recreational Craft Personal Injury Issues*, 68 TUL. L. REV. 423 (1994). Until *Calhoun*, the Court of Appeals also seemed to be in agreement with application of general maritime law to recreational boaters. *See Sinclair v. Soniform, Inc.*, 935 F.2d 599, 603 (3d Cir. 1991). Indeed, the existence of admiralty jurisdiction in this case is incontrovertible.

There is now a convergence of this Court's maritime jurisdictional decisions and its substantive maritime tort law. It is consistent with this Court's previous decisions that the substantive maritime law should follow maritime jurisdiction in cases involving torts arising from recreational vessels. This Court should clarify this issue and, to the extent necessary, fashion the appropriate wrongful death and survival remedies in the same manner used in *Moragne* and its successors.

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[18] (...continued)
(2d ed. 1975). "Not infrequently the personal injury cases seemed to present a problem of choice between a federal or maritime law rule and a state common law or statutory rule. . . . State law rules which were not inconsistent with the court's reformulation of the substantive law were allowed to continue to influence the results in litigation. The federal solution was reserved for cases in which results consistent with the reformulation of substantive law required the application of an old or the fashioning of a new rule of maritime law. . . ." *Id.* The case law since 1970 has only furthered this development.

As noted above, the reasons for fashioning tort remedies for the general maritime law center on the goal of uniformity. A general maritime tort remedy treats all similarly situated persons within admiralty jurisdiction in a uniform and predictable manner. It precludes forum shopping. It removes the anomalies created by the differences in remedies among the states. And, it promotes harmony with the federal statutory scheme applicable to recreational boating. Moreover, there is no compelling state or local interest which should override the development of appropriate remedies. *Kossick v. United Fruit Co.*, 365 U.S. 731, 738-42 (1961).

III.

THE USE OF STATE WRONGFUL DEATH AND SURVIVAL REMEDIES WOULD RESULT IN IRRECONCILABLE AND UNJUST OUTCOMES FOR SIMILARLY SITUATED PERSONS.

A. Drowning In The Sea Of State Law.

The accident resulting in the death of Natalie K. Calhoun is not unlike many unfortunate accidents giving rise to maritime tort law suits in that such accidents share certain common elements: a navigable body of water, a vessel, allegations of negligence, strict liability or breach of warranty, risks normally associated with perils of the sea, and common navigation rules. The commonality of elements results in similarly situated plaintiffs and strongly suggests the desirability of equal treatment before the law. And yet, the Court of Appeals would have the myriad and diverse state laws govern the rights of those similarly situated plaintiffs. The Court of Appeals did not offer a rationale for such a conclusion and its opinion does not even attempt any review or analysis of any state laws to justify such an opinion and which would eliminate what appears on its face to be an unjust and inequitable result.

However, a proper analysis of state laws would demonstrate that the application of state wrongful death and survival action remedies would result in endless and impossible conflicts no less in number and no less unjust than those faced by this Court in *Moragne*. The conflicts would result both from the interstate differences in the law and the conflicts between state law and the general maritime law.

B. The Nature Of State Wrongful Death And Survival Remedies And The Likelihood Of Conflict.

Wrongful death and survival remedies are found in all states and were created by state legislatures to supplement the common law which precluded such remedies. In essence, the wrongful death remedy usually permits next of kin to maintain a cause of action for the death of a loved one and a survival remedy preserves the causes of action available to a decedent before he dies. Most important for this analysis is the fact that the remedies preserve whatever tort causes of action are available under the general laws of the state. Thus, a plaintiff may allege a right to bring a cause of action pursuant to a wrongful death statute, but must plead the elements of a recognized tort in order to state a valid cause of action.

It logically follows that a proper impact analysis of the application of state remedies to persons similarly situated in the maritime must include not only the remedies themselves, but also the substantive tort law which would be the basis of any cause of action authorized by the remedies. And it is in that state substantive tort law where the significant differences among the states may be found.

General maritime law provides that all actions involving personal injury must be commenced within three (3) years of the date of occurrence. 46 U.S.C. § 763a. The law pro-

vides that pure comparative fault be used to reduce a plaintiff's recovery by the percentage of the decedent's fault, but does not provide a complete bar to recovery for damages. *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975). Finally, the general maritime law does not limit the amount of damages that may be recovered for personal injury, including death.

In stark contrast to the above, differences in the wrongful death and survival act statutes of the numerous states having navigable waters with respect to the amounts of damages recoverable, statutes of limitations and comparative fault rules are significant. We only need to survey a handful of states bordering identical bodies of water to demonstrate these differences.

For example, in Indiana, bordering Lake Michigan, if the defendant in a wrongful death action is the decedent's employer, liability shall not exceed $10,000. Ind. Code § 22-3-9-6 (1991). Indiana does not otherwise limit the amount of damages recoverable in a wrongful death action. *Id.* § 34-1-1-2 (1983). In contrast, Wisconsin limits damages for loss of society and companionship to $150,000. Wis. Stat. Ann. § 895.04(4) (1995). Illinois limits non-economic damages to $500,000 and bars all recovery for hedonic damages. 740 ILCS 180/2 (1995); 735 ILCS 5/2-1115.1(a) (1995).

Indiana, Wisconsin and Illinois further limit recovery by reducing available damages by the percentage of fault attributable to the decedent.[19] However, if the decedent's fault is determined to be greater than that of the defendants, recovery is barred altogether.[20] In contrast, Michigan does not

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[19] Ind. Code § 34-4-33-3 (1995) and § 34-4-33-4 (1995); Wis. Stat. Ann. § 895.045 (1995); 740 ILCS 180/2 (1995).

[20] *Id.*

bar recovery regardless of the decedent's degree of fault, but only reduces damages by that percentage. Mich. Comp. Laws § 600.2949 (1986).

In terms of when an action may be maintained, Indiana and Illinois adhere to a two (2) year limitation period from the date of death.[21] In Wisconsin, an action must be brought within three (3) years. Wis. Stat. Ann. § 893.54 (1983). And in Michigan, the applicable limitations period depends on the underlying cause of action upon which recovery is sought. Mich. Comp. Laws. § 600.2922 (1986).

The laws governing the various states bordering navigable waters other than the Great Lakes also differ significantly. For example, Maine limits damages for loss of comfort, society and companionship, including damages for emotional distress, to $75,000. Me. Rev. Stat. Ann. tit. 18-A, § 2-804(b) (1981). It also limits punitive damages to $75,000. *Id.* In contrast, New York law specifically provides that the amount of damages recoverable due to injuries causing death shall not be subject to any statutory limitations. N.Y. Civ. Prac. L. & R. Art 1, § 16 (1939). Similarly, Connecticut does not significantly limit the damages recoverable. Conn. Gen. Stat. Ann. § 52-555 (1991).

All of these states, Maine, New York, and Connecticut, generally proscribe a two (2) year limitations period from the time of a death within which to bring an action.[22] However, Connecticut further restricts when an action may be commenced by refusing to recognize any actions for wrongful death commenced more than five years from the date of

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[21] Ind. Code § 34-1-1-2 (1983); 740 ILCS 180/2 (1995).

[22] Me. Rev. Stat. Ann. tit. 18-A, § 2-804(b) (1981); *Debrino v. Benaquista & Benaquista Realty, Inc.*, 522 N.Y.2d 980, 135 A.D.2d 1044 (3d Dpmnt. 1987); Conn. Gen. Stat. Ann. § 52-555 (1991).

the wrongful act or omission. Conn. Gen. Stat. Ann. § 52-555 (1991).

These states also differ in their application of a contributory negligence rule. The rule followed by Connecticut provides that recovery is completely barred if the plaintiff or decedent's fault is greater than the fault of all defendants. Conn. Gen. Stat. Ann. § 52-572h(b) (1991). In contrast, in Maine and New York, a decedent's fault serves only to reduce recovery by the degree of that fault.[23]

Other states also differ in their application of rules governing recovery in wrongful death actions. The maximum money damages recoverable for injury or death from the Texas state government or a municipality thereof is $250,000 per person and $500,000 for each single occurrence. Tex. Civ. Prac. & Rem. Code Ann. § 101.023 (1986). Maximum money damages recoverable against a unit of local government are $100,000 for each person and $300,000 for each single occurrence. *Id.* Louisiana limits damages in a death action against the state to $500,000. La. Rev. Stat. Ann. § 13:5106 (1991). An action for wrongful death under Texas law must be commenced within two (2) years from the date of death. Tx. Civ. Prac. & Rem. Code Ann. § 16.003 (1986). In Louisiana, an action must be commenced within one (1) year. La. Civ. Code Ann. art. 2315.2 (1995). In Texas, recovery for wrongful death due to negligence is completely barred if the decedent's fault was greater than that of all defendants. Tx. Civ. Prac. & Rem. Code Ann. § 33.001 (1995). In contrast, Louisiana only reduces the amount of recovery by the degree of the decedent's fault. La. Civ. Code Ann. art. 2323 (1995).

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[23] Code Me. R. 14 § 156; N.Y. Civ. Prac. L. & R. § 1411 (1976).

California, Oregon and Washington on the west coast also differ in the application of their wrongful death statutes. In California, an action must be brought within one (1) year of the death. Cal. Civ. Proc. § 340 (1982). Damages are limited to the loss/damages that the decedent sustained or incurred before death including any punitive or exemplary damages the decedent would have been entitled to had he/she lived, but do not include pain suffering or disfigurement. Cal. Civ. Proc. § 377.34 (1992). A decedent's contributory negligence does not bar recovery, but only reduces recovery by the degree of decedent's fault. Cal. Civ. Code § 1714 (1978).

In contrast, in Oregon, a wrongful death action must be commenced within three (3) years of the death. Or. Rev. Stat. § 30.020 (1991). In Washington, the action must be commenced within two (2) years. Wash. Rev. Code § 4.16.130 (1988). Neither Oregon nor Washington significantly limit damages available. Or. Rev. Stat. § 30.020 (1991); Wash. Rev. Code § 4.20.020 (1985). Oregon bars all recovery if a decedent's fault is greater than the fault of all defendants. Or. Rev. Stat. § 18.470 (1993). Washington, like California, only reduces recovery by the degree of the decedent's fault. Wash. Rev. Code § 4.22.005 (1981).

Finally, Puerto Rico, the locale of the subject incident, and Pennsylvania, the state in which Petitioners brought the instant action, also differ with respect to the laws of their wrongful death and survival acts. In Pennsylvania, damages where a governmental unit is liable cannot exceed $500,000 and are limited to past and future earning capacity, pain and suffering due to death, medical expenses, loss of consortium, loss of support and property losses. Pa. Cons. Stat. Ann. § 8553 (1982). Puerto Rico has a one (1) year limitations period from date of death within which to file an action. P.R. Laws Ann. tit. 31, § 5298 (1991). Pennsylvania has a two (2) year limitation period which is further re-

stricted by the requirement that the limitation period on the underlying personal injury action had not run before the decedent's death. Pa. Cons. Stat. Ann. § 8301 (1982). Puerto Rico requires that any recovery be reduced by the degree of fault attributable to the decedent. P.R. Laws Ann. tit. 31, § 5141 (1991).[24] The rule followed by Pennsylvania provides that recovery is completely barred if the plaintiff or decedent's fault is greater than the fault of all defendants. Pa. Cons. Stat. Ann. § 7102 (1982).

Obviously, it will be important in which state's territorial waters an accident occurs for even though two states share the same navigable waters, the available remedies may differ significantly. There is no principled or logical justification for allowing such a difference to exist when the occurrence leading to death occurs on a navigable water, is governed by the same federal rules as to navigation and boat safety and is subject to maritime jurisdiction. Similarly situated plaintiffs should not be treated differently.

C. State-Maritime Law Conflicts.

The Court of Appeals found no conflict between state wrongful death and survival remedies and general maritime law because there allegedly are no similar remedies for non-seamen. Even if that conclusion is correct based on a reading of *Moragne*, it is totally incorrect in the context of *all* maritime tort law. It is not only the difference among the state wrongful death and survival remedies that creates unjustified anomalies in the law of wrongful death. Using

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[24] If a decedent employee knew of the defect or negligence which caused his injury and failed to give notice within a reasonable time, his heirs are not entitled to any compensation as against the employer.

a state wrongful death and survival remedy in a maritime case creates its own set of anomalies.

Maritime law recognizes a general theory of products liability for negligence including strict liability. *See East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858 (1986). Maritime law also recognizes the doctrine of pure comparative fault. *See United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975). The maritime statute of limitations for personal injury actions, including death, is three years. 46 U.S.C. § 763a. The problem develops, of course, from the need to apply a substantive body of law consistent with the principals of maritime law, after having adopted a state wrongful death and survival remedy. This Court has previously held that ". . . when admiralty adopts a state's right of action for wrongful death, it must enforce the right as an integrated whole, with whatever conditions and limitations the creating state has attached." *THE TUNGUS v. Skovgaard*, 358 U.S. 588, 592 (1959) (*citing THE HARRISBURG*, 119 U.S. 199 (1886)). But applying state substantive law would result in many instances in the abrogation of maritime substantive law. Thus, rather than state law "supplementing" a void in the maritime law, state law would supplant maritime law which would otherwise apply, in total contradiction to the supremacy of maritime law, and uniformity. Indeed, the anomaly of the situation is clearly demonstrated by the instant case: had Natalie Calhoun only been injured as opposed to killed, there is no doubt that federal maritime law would apply to her claims.

The perverse effects created by the use of state remedies in the arena of maritime tort law can best be illustrated by a hypothetical death due to a negligence scenario occurring on the Illinois navigable waters of Lake Michigan arising

from an alleged breach of federal navigational rules.[25] Illinois has a two year statute of limitations for bringing a wrongful death claim, a cap on non-economic damages and a 51% contributory negligence rule. In contrast, general maritime law has a three year statute of limitations, no cap on damages and a pure comparative fault rule. Does the maritime pure comparative fault doctrine supersede the Illinois 51% rule? Does the Illinois limit on non-economic damages "cap" the recovery otherwise available under maritime law? If the action is filed within three years, but after two years from the date of the occurrence or death, is the action barred? *THE TUNGUS* decision would mandate the use of state law to the exclusion of existing and applicable maritime law even though the accident arose from a breach of the *federal* navigational rules.

The inequities in such an outcome can be further illustrated by another hypothetical. If Natalie Calhoun owned the vessel she was driving and was carrying a passenger who was injured but not killed, Natalie would have a state law remedy while her passenger would have maritime remedies against her and Yamaha. Or, if both Natalie and her passenger were passengers on someone else's vessel, their remedies would differ. In either case, Yamaha would find itself swamped in the differences between state and maritime law.[26]

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[25] Lake Michigan has been selected because it is the body of water on which Mr. Sisson's vessel, the M/V ULTORIAN, was found at the time of the fire. *Sisson v. Ruby*, 497 U.S. 358, n.4, (1990).

[26] The Court of Appeals below downplayed the significance of different recoveries based on a party's status. Petition at A-41. But the real problem is illustrated here, where the status of the parties is the same.

These illustrations demonstrate the fallacy in the preemption analysis of the Court of Appeals. It is important whether you adopt a state remedy or only use state remedies as sources of law from which to fashion a uniform maritime remedy. In the former case, you end up displacing maritime law while in the latter you fill a void in the general maritime law by fashioning a maritime remedy without the state law baggage.

D. The Need For A Judicial Pronouncement Of A Uniform Maritime Remedy.

Clearly, without a reversal of the Court of Appeals decision below, and a pronouncement of the application of *Moragne* (along with the creation of a maritime survival action) to recreational boating accidents, the "anomalies" rectified by *Moragne* and other decisions will overtake maritime tort law and destroy uniformity. This Court should define maritime tort law in this context as is appropriate and necessary, to the exclusion of state wrongful death and survival remedies, the application of which can only lead to troublesome results.

This Court's decision in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955), is a good example of the conflict and confusion created when the principal of uniformity is "displaced" by state law. *Wilburn* involved the destruction of a small houseboat for commercial use on an artificial inland lake and the insurer's refusal to pay a claim for the loss because of alleged breaches of "warranties." The issue before the Court was whether any breach of warranty, although unrelated to the loss, bars recovery under a maritime contract of insurance.

The maritime jurisdiction of the Court in *Wilburn* was acknowledged as the policy was a maritime contract. *Id.* at 313. The Court made two inquiries: "(1) Is there a judicially

established federal admiralty rule governing these warranties; (2) If not, should we fashion one?" *Id.* at 315. Finding that there was no maritime rule of warranties, that the law of insurance was historically governed by the states, that insurance disputes were generally handled in state courts, and that Congress left regulation to the states, the majority of the Court felt compelled to leave regulation with the States.

The *Wilburn* decision has been harshly criticized.[27] Insurance policies have been "as unquestionably an integral part of the admiralty and maritime jurisdiction as is any other subject matter."[28] By not fashioning a rule of law on this outcome determinative issue, the Court in essence precluded the future development of a maritime rule of law in this most fundamental area of maritime jurisprudence. While sharing all of the indices of maritime jurisdiction, historical underpinnings and commercial necessity, the interpretation of maritime policies of insurance are to be subject to the local state rules of law.

This same outcome is likely in the maritime tort law if this court affirms the decision of the Court of Appeals. It would be impossible to justify such an outcome in light of the "displacement" of existing substantive maritime law which would result.

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[27] *See* Gilmore & Black, *The Law of Admiralty*, § 2-8 (2d ed. 1975).

[28] *Id.* § 2-1, p. 53.

IV.

IS THIS ANOTHER WAY TO CIRCUMVENT ADMIRALTY JURISDICTION FOR RECREATIONAL VESSELS.

The Appellate Court's decision in *Yamaha* is yet another example of the undeniable confusion which presently characterizes maritime jurisdiction inquiries by the lower courts, where little or none existed under the old "situs" test. Even after this Court decided *Sisson*, the lower courts continued to apply multi-factored jurisdictional tests as set forth in *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973), *cert. denied*, 416 U.S. 969 (1974) and *Edynak v. Atlantic Shipping, Inc.*, 562 F.2d 515 (3d Cir. 1977) or variations thereof.

For instance, the third and fourth circuits, while acknowledging they were bound by *Sisson*, continued to use the *Kelly* factors. *Sinclair v. Soniforn, Inc.*, 935 F.2d 599, 602 (3d Cir. 1991); *Price v. Price*, 929 F.2d 131, 135 (4th Cir. 1991). A district court in Maryland, following the multi-part test fashioned a commercial "hit the tanker" test showing lower courts unnecessary focus on commerce. *Smith v. Knowles*, 642 F. Supp. 1137 (D. Md. 1986).

This Court has had to address admiralty tort jurisdictional issues four times[29] since 1972. This case raises essentially the same issue. Part of the reason may be philosophical, that admiralty jurisdiction and law should not apply in the recreational context, but we believe the real confusion has been the nexus test first created in *Executive Jet*. While the original nexus decision in *Executive Jet* may have been restricted to aircraft, we submit it was not necessary if the Court used the original situs test and the obvious, unstated

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[29] *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 429 (1972); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982); *Sisson v. Ruby*, 497 U.S. 358 (1990); *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, ___ U.S. ___ 115 S. Ct. 1043 (1995).

rule, that a vessel be involved. Admiralty jurisdiction is constitutional, and may be augmented by Congress under the Commerce Clause. However, the constitution does not require commerce under Article III. Even if commerce is required, 20 million boats on the water represents a substantial commercial impact. What is the difference between vacationers on the Q.E. 2, or 100 people on a sightseeing boat on the Potomac River, or one person who rents and operates a wave runner on navigable water. All of these people are involved in recreational pursuits that directly impact on commerce.

This Court has struggled with the commercial/recreational argument for years resulting in extensive litigation over the issue of admiralty jurisdiction and what law applies. The doctrine of uniformity in admiralty law should provide the real focus. It is the use of navigable waterways that demands uniformity.

We urge the Court to reconsider the arguments made in *Sisson* and *Grubart* that the Court return to the situs test analysis. If you have a vessel on navigable waters, you have admiralty jurisdiction and admiralty law applies. If no admiralty rule exists, the Court should then fashion one. This will give uniformity and end the "paper chase" approach we presently have.

CONCLUSION

The MLA respectfully urges this Court to reaffirm the principal of uniformity in the area of maritime tort law by applying *Moragne* to the death actions of recreational boaters. Alternatively, this Court should fashion an appropriate general maritime wrongful death and survival remedy consistent with its maritime tort jurisprudence. The decision

of the Court of Appeals should therefore be reversed and the case remanded for further proceedings consistent with such a decision.

Respectfully submitted,

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Supreme Court, U.S.
FILED
SEP 15 1995
OFFICE OF THE CLERK

No. 94-1387

(9)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

YAMAHA MOTOR CORPORATION, U.S.A. and
YAMAHA MOTOR COMPANY, LTD.,
Petitioners,

v.

LUCIEN B. CALHOUN and ROBIN L. CALHOUN,
Individually and as Administrators of the
Estate of Natalie K. Calhoun, Deceased,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit**

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Amici will address the following question:

Whether the judicially created federal maritime wrongful death remedy preempts state wrongful death and survival remedies for torts occurring within a State's territorial waters.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
THE GENERAL MARITIME LAW'S WRONGFUL DEATH REMEDY DOES NOT PREEMPT THE APPLICATION OF STATE WRONGFUL DEATH REMEDIES TO A TORT WHICH OCCURS WITHIN THE STATE'S TERRITORIAL WATERS AND VIOLATES STATE LAW DUTIES	4
I. THE MARITIME LAW HAS LONG APPLIED STATE WRONGFUL DEATH AND SURVIVAL REMEDIES	4
II. CONGRESS HAS EXPRESSLY LEFT TO THE STATES THE SUBJECT MATTER OF THE REMEDY FOR THE WRONGFUL DEATH OF A NON-SEAMAN OCCURRING IN TERRITORIAL WATERS	14
III. THE *MORAGNE* REMEDY DOES NOT PREEMPT STATE WRONGFUL DEATH REMEDIES	20
IV. THE *MORAGNE* REMEDY SHOULD NOT BE EXTENDED TO PREEMPT STATE WRONGFUL DEATH REMEDIES	24
CONCLUSION	30
APPENDIX:	
Selected State Recreational Boating Safety Statutes	1a

TABLE OF AUTHORITIES

Cases	Page
American Dredging Co. v. Miller, 114 S.Ct. 981 (1994)	11, 14
Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973)	13
Carlisle Packing Co. v. Sandanger, 259 U.S. 255 (1922)	26
Chelentis v. Luckenbach S.S. Co., 247 U.S. 372 (1918)	26
Cipollone v. Liggett Group, Inc., 112 S.Ct. 2608 (1992)	19, 20
Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1852)	17
East River S.S. Corp. v. Transamerica Delaval, 476 U.S. 858 (1986)	23
Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)	30
Ex Parte Boyer, 109 U.S. 629 (1884)	29
Finneseth v. Carter, 712 F.2d 1041 (6th Cir. 1983)	29
Jerome B. Grubart v. Great Lakes Dredge & Dock Co., 115 S.Ct. 1043 (1995)	5, 30
Hahn v. Ross Island Sand & Gravel Co., 358 U.S. 272 (1959)	27
Holmes v. Oregon & C. Ry. Co., 5 F. 75 (D. Or. 1880)	8
Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960)	23
In re Long Island Transp. Co., 5 F. 599 (S.D.N.Y. 1881)	8
Just v. Chambers, 312 U.S. 383 (1941)	4, 5-6, 9, 10
Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959)	26
Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920)	13
La Bourgogne, 210 U.S. 95 (1908)	9
Lindgren v. United States, 281 U.S. 38 (1930)	15
Luke v. Lyde, 2 Burr. 882, 97 Eng. Rep. 614 (K.B. 1759)	12
Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944)	18, 24
Messel v. Foundation Co., 274 U.S. 427 (1927)	27
Miles v. Apex Marine Corp., 498 U.S. 19 (1990)	14, 15, 22, 24

TABLE OF AUTHORITIES—Continued

	Page
Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960)	18
Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978)	15
Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970)	*passim*
New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 115 S.Ct. 1671 (1995)	19
Noel v. Linea Aeropostol Venezolana, 260 F. Supp. 1002 (S.D.N.Y. 1966)	26
Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986)	2, 15, 16, 17
Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953)	26-27
Reynolds v. Bradley, 644 F. Supp. 42 (N.D.N.Y. 1986)	29
Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947)	19
Robins Dry Dock & Repair Co. v. Dahl, 266 U.S. 449 (1925)	27
Romero v. International Terminal Operating Co., 358 U.S. 354 (1959)	*passim*
Seas Shipping Co., Inc. v. Sieracki, 328 U.S. 85 (1946)	18
Sherlock v. Alling, 93 U.S. 99 (1876)	*passim*
Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984)	20
Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917)	*passim*
Steamboat Co. v. Chase, 83 U.S. (16 Wall.) 522 (1872)	*passim*
Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842)	12
The City of Norwalk, 55 F. 98 (S.D.N.Y. 1893), *aff'd in part and rev'd in part*, 61 F. 364 (2d Cir. 1894)	*passim*
The Corsair, 145 U.S. 335 (1892)	8
The Daniel Ball, 77 U.S. (10 Wall.) 557 (1871)	29
The E.B. Ward, Jr., 17 F. 456 (C.C.E.D. La. 1883)	8
The Garland, 5 F. 924 (E.D. Mich. 1881)	8
The Harrisburg, 119 U.S. 199 (1886)	6, 8, 9, 16

TABLE OF AUTHORITIES—Continued

	Page
The James Berwind, 44 F. 693 (S.D.N.Y.), *rev'd*, 49 F. 956 (2d Cir. 1891)	8
The Lottawanna, 88 U.S. (21 Wall.) 558 (1875)	10, 14
The Montello, 87 U.S. (20 Wall.) 430 (1874)	29
The Oregon, 45 F. 62 (D.Or. 1891), *rev'd*, 158 U.S. 186 (1895)	8
The Robert W. Parsons, 191 U.S. 17 (1903)	29
The St. Nicholas, 49 F. 671 (S.D. Ga. 1891)	8
The Sylvan Glen, 9 F. 335 (E.D.N.Y. 1881)	8
The Vera Cruz, 10 App. Cas. 59 (H.L. 1884)	10
Western Fuel Co. v. Garcia, 275 U.S. 233 (1921)	6, 8, 10
Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1955)	17
Workman v. City of New York, 179 U.S. 552 (1900)	27
Statutes	
18 U.S.C. § 7	28
18 U.S.C. § 13	28
46 U.S.C. § 12301	27
Death on the High Seas Act, 46 App. U.S.C. §§ 761-77	
46 App. U.S.C. § 761	14-15, 15
46 App. U.S.C. § 762	14-15
46 App. U.S.C. § 764	25
46 App. U.S.C. § 767	2, 16
Federal Employers' Liability Act, 45 U.S.C. §§ 51-60	15
Jones Act, 46 App. U.S.C. § 688	15
Judiciary Act of 1789, § 9, 1 Stat. 76, 28 U.S.C. § 1333(1)	2, 6, 13, 16
Longshore and Harbor Workers' Compensation Act, 86 Stat. 1251, 33 U.S.C. §§ 901-950	14, 22
Other Authorities	
Alexandra Alger & William G. Flanagan, *Snowmobiles of the Sea*, Forbes, Aug. 28, 1995	1
Amy Argetsinger, *Deaths Rise as More People Ride the Waves*, The Washington Post, Aug. 27, 1995	1

TABLE OF AUTHORITIES—Continued

	Page
William R. Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates*, 37 Am. J. Legal Hist. 117 (1993)	12
David P. Currie, *Federalism and the Admiralty: "The Devil's Own Mess"*, 1960 Supreme Ct. Rev. 158	12
Dan B. Dobbs, *Torts and Compensation* (1985)	26
3 Jonathan Elliott, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* (2d ed. 1907)	12
The Federalist No. 45 (James Madison) (Isaac Kramnick ed., 1987)	4
The Federalist No. 80 (Alexander Hamilton) (Isaac Kramnick ed., 1987)	11, 12
Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* (2d ed. 1975)	6, 27
H.R. Rep. No. 674, 66th Cong., 2d Sess. (1920)	15-16
Robert M. Hughes, *Handbook of Admiralty Law* (2d ed. 1920)	9, 10
William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law* (1987)	28
Ralph McCaughan, *Federal Maritime Jurisdiction Over Inland Intrastate Lakes*, 26 Wash. & Lee L. Rev. 1 (1969)	29-30
Jon Nordheimer, *It Mimics A Mosquito, But Inflicts Worse Injury*, The New York Times, Aug. 27, 1995	1
Thomas J. Schoenbaum, *Admiralty and Maritime Law* (1987)	21, 27, 29
S. Rep. No. 216, 66th Cong., 1st Sess. (1919)	15
Preble Stolz, *Pleasure Boating and Admiralty:* Erie *at Sea*, 51 Cal. L. Rev. 661 (1963)	11-12, 28
U.S. Department of Transportation, U.S. Coast Guard Commandant Instruction M16750.5C (Dec. 22, 1988)	1

INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. This case involves an issue at the core of *amici*'s interest: whether the judicially created federal admiralty remedy preempts state wrongful death and survival remedies for those torts occurring within a State's territorial waters.

Long before federal admiralty law recognized a remedy for wrongful death, the States exercised their police powers to protect their citizens by creating remedies for tortious conduct causing death. The Court has long affirmed the States' authority to provide remedies for maritime torts causing death. Moreover, the States bear "primary responsibility for recreational boating safety law enforcement, education and assistance." U.S. Department of Transportation, U.S. Coast Guard Commandant Instruction M16750.5C (Dec. 22, 1988) (promulgating The Boating Safety Manual (State Edition)). Every State has enacted statutes regulating recreational vessel safety and either established marine police forces or authorized other personnel to enforce these laws. *See* Appendix. States are also taking the initiative in responding to the increase in serious jet ski accidents. *See id.*[1]

Because of the importance of this issue to *amici* and their members, this brief is submitted to assist the Court in its resolution of the case.[2]

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[1] *See also* Alexandra Alger & William G. Flanagan, *Snowmobiles of the Sea*, Forbes, Aug. 28, 1995, at 304, 305; Jon Nordheimer, *It Mimics A Mosquito, But Inflicts Worse Injury*, N.Y. Times, Aug. 27, 1995, at 31, 36; Amy Argetsinger, *Deaths Rise as More People Ride the Waves*, Washington Post, Aug. 27, 1995, at A1, A6-A7.

[2] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

1. The Court has long recognized the States' authority to provide remedies for tortious conduct which causes death within their borders even when such conduct occurs within the admiralty jurisdiction. The Court has repeatedly held that state created wrongful death remedies do not violate the essential uniformity of the maritime law.

The Court's creation of a wrongful death remedy under the federal maritime law does not render the application of state remedies in maritime tort actions anomalous. Indeed, as the Court has recognized, such remedies are saved to suitors under § 9 of the Judiciary Act of 1789. Thus, reviving *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), to hold that federal common law rules preempt state wrongful death remedies would mark an undue intrusion into the States' authority to protect the safety and lives of their citizens. It is also unwarranted because state laws regulating maritime affairs remain subject to the restraints of the dormant commerce and due process clauses as well as preemption through either legislative action or the treaty power.

2. Holding that the federal common law admiralty remedy preempts state remedies would be especially unwarranted because Congress has expressly left to the States the subject matter of the remedy for the wrongful death of a non-seaman in territorial waters. While Congress has enacted a remedy for wrongful death arising out of maritime torts applicable to non-seamen (which preempts state remedies), by its express terms the remedy applies only to deaths occurring on the high seas. *See* 46 App. U.S.C. § 761. Congress also expressly preserved state remedies for torts occurring within a State's territorial waters. *Id.* § 767. As the Court has observed, "the [Death on the High Seas] Act saved to survivors of those killed on territorial waters the ability to pursue a state wrongful death remedy in state court." *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 225 (1986). And Congress preserved state remedies aware that they "may actually have been more generous than the remedy provided by [DOHSA]."

Moragne v. States Marine Lines, Inc., 398 U.S. 375, 398 (1970). If there is a national interest in having a uniform rule limiting maritime wrongful death recoveries, Congress should make that choice.

3. Nor does *Moragne*'s creation of a wrongful death remedy in order to vindicate the uniquely federal duty of seaworthiness support the preemption of state wrongful death remedies. This federal rule (which imposes an absolute duty on vessel owners to provide seamen and formerly other maritime employees with a seaworthy workplace) "ha[d] become the principal vehicle for recovery by seamen for injury or death." 398 U.S. at 399. The *Moragne* Court was thus properly concerned with ensuring the vindication of this exclusively federal maritime duty. But where, as here, the duties which have been breached violate state law as well, the States retain a substantial interest in enforcing them. Consistent with the Court's recognition that the States may exercise substantial regulatory authority over maritime affairs concurrent with that of the Federal Government, the Court should make clear that *Moragne* does not preempt a state remedy when the underlying duty is cognizable under state law.

4. Holding that the *Moragne* remedy preempts state wrongful death remedies within the State's territorial waters would lead to the perverse result that those harmed by the same tortious conduct will have different recoveries depending solely upon whether the tort occurred on navigable waters (and within the admiralty jurisdiction), or on the State's inland waters. Indeed, because of the reach of the admiralty jurisdiction, adopting petitioners' rule will prompt much wasteful litigation over whether seemingly inland bodies of water are within it.

Moreover, unlike Congress, federal courts do not have the power to create a common law applicable to all torts. Thus, while petitioners assert that the preemption of state remedies is necessary to avoid anomalous treatment of claimants, their regime will impose anomalous results on a far wider scale. The Court should therefore reaffirm the

States' authority to remedy all tortious waterborne deaths occurring within their borders.

ARGUMENT

THE GENERAL MARITIME LAW'S WRONGFUL DEATH REMEDY DOES NOT PREEMPT THE APPLICATION OF STATE WRONGFUL DEATH REMEDIES TO A TORT WHICH OCCURS WITHIN THE STATE'S TERRITORIAL WATERS AND VIOLATES STATE LAW DUTIES

I. THE MARITIME LAW HAS LONG APPLIED STATE WRONGFUL DEATH AND SURVIVAL REMEDIES

This Court has long recognized that the "[m]aritime law is not a monistic system" which always requires the application of uniform federal rules. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 374 (1959). Indeed, because "the maritime law [is] not a complete and perfect system . . . in all maritime countries there is a considerable body of municipal law that underlies the maritime law as the basis of its administration." *Just v. Chambers*, 312 U.S. 383, 390 (1941). As Justice Holmes observed, "The maritime law is not a corpus juris —it is a very limited body of customs and ordinances of the sea." *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 220 (1917) (Holmes, J., dissenting); *see also The City of Norwalk*, 55 F. 98, 107 (S.D.N.Y. 1893) (cited with approval in *Just*, 312 U.S. at 389), *aff'd in part and rev'd in part*, 61 F. 364 (2d Cir. 1894).

Our constitutional system is founded on the recognition that the States possess sovereign authority over "all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people." The Federalist No. 45, at 296 (Isaac Kramnick ed. 1987). Thus, notwithstanding that the Constitution "empowered the federal courts in their exercise of the admiralty and maritime jurisdiction which had been conferred on them, to draw on the substantive law 'inherent in the admiralty and maritime jurisdiction' and to continue the development of this law within constitutional limits," *Romero*,

358 U.S. at 360-61 (citation omitted), the Court has exercised this power mindful that "[t]he State and Federal Governments jointly exert regulatory powers today as they have played joint roles in the development of maritime law throughout our history." *Id.* at 374. As the Court further noted in *Romero*:

> Although the corpus of admiralty law is federal in the sense that it derives from the implications of Article III evolved by the courts, to claim that all enforced rights pertaining to matters maritime are rooted in federal law is a destructive oversimplification of the highly intricate interplay of the States and the National Government in their regulation of maritime commerce. It is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system. But this limitation still leaves the States a wide scope.

Id. at 373 (footnote omitted). *See also Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 115 S.Ct. 1043, 1054 (1995); *The City of Norwalk*, 55 F. at 106.

State remedies for wrongful death and the survival of actions are among those state created legal rights which admiralty courts have long enforced.[3] *See Just*, 312 U.S.

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[3] In *Romero*, the Court described the extent to which federal admiralty law has looked to state law in adjudicating disputes:

> State-created liens are enforced in admiralty. State remedies for wrongful death and state statutes providing for the survival of actions, both historically absent from the relief offered by the admiralty, have been upheld when applied to maritime causes of action. Federal courts have enforced these statutes. State rules for the partition and sale of ships, state laws governing the specific performance of arbitration agreements, state laws regulating the effect of a breach of warranty under contracts of maritime insurance—all these laws and others have been accepted as rules of decision in admiralty cases, even, at times, when they conflicted with a rule of maritime law which did not require uniformity.

358 U.S. at 373-74 (footnotes omitted). *See also The City of Norwalk*, 55 F. at 106-07.

at 391-92; *Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921). Whether the admiralty enforced these remedies because they were viewed as "maritime [but] local in character," *id.* at 242, or as "general legislation [enacted] by the states, applicable alike on land and water, in their exercise of the police power for the preservation of life and health," *The City of Norwalk*, 55 F. at 106, one thing is clear: their application to those maritime torts occurring within a State's territorial waters traditionally was not viewed as "work[ing] material prejudice to the characteristic features of the general maritime law or interfer[ing] with the proper harmony and uniformity of that law in its international and interstate relations." *Jensen*, 244 U.S. at 216.

This was so even though until 1970 there was no remedy for wrongful death under the federal general maritime law as adjudged by this Court. *See Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970); *The Harrisburg*, 119 U.S. 199 (1886). Indeed, even before *The Harrisburg*, the Court had held that state created wrongful death and survival remedies were enforceable in maritime tort actions as remedies which were saved to suitors under the Judiciary Act of 1789, 1 Stat. 76-77. *See Sherlock v. Alling*, 93 U.S. 99 (1876); *Steamboat Co. v. Chase*, 83 U.S. (16 Wall.) 522 (1872).[4]

In *Steamboat Co. v. Chase*, the Court upheld the application of Rhode Island's wrongful death and survival statutes in a suit based on a collision between a sailboat and steamer. In so holding, the Court rejected the defendant's contentions that the State could not "give a remedy to a suitor for a consequential injury growing out of a marine tort, when no remedy for such injury exists

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[4] As explained at pp. 20-23 *infra*, the Court's creation in *Moragne* of a wrongful death remedy to vindicate the uniquely federal duty of seaworthiness does not support preemption of state wrongful death remedies where tortious conduct violates both maritime and state law duties. For a discussion of the type of conditions which violate the seaworthiness duty, *see* Grant Gilmore & Charles L. Black, Jr., *The Law Of Admiralty* 383-404 (2d ed. 1975).

in the admiralty." *Id.* at 524. There, defendants argued that the purpose of the constitutional grant of admiralty jurisdiction to the federal courts "was to create a maritime court for the purpose of administering the universal law of the seas" and that "there is an obvious propriety in excluding the courts of common law from adjudicating upon subjects which are, from their nature, of admiralty cognizance." *Id.* The Court dismissed these arguments, strikingly similar to those of Yamaha, reasoning that the common law was competent to provide the remedy and the right to the remedy was secured under the savings to suitors clause. *Id.* at 533 (citing 1 Stat. 76, § 9).

In *Sherlock*, the Court upheld the application of Indiana's wrongful death and survival statute to a suit arising out of the death of a steamer passenger. There, defendants objected on the ground that "the statute of Indiana creates a new liability, and could not, therefore, be applied to cases where the injuries complained of were caused by marine torts, without interfering with the exclusive regulation of commerce vested in Congress." *Id.* at 101-02. The Court rejected this uniformity argument, stating:

> with reference to a great variety of matters touching the rights and liabilities of persons engaged in commerce, either as owners or navigators of vessels, the laws of Congress are silent, and the laws of the State govern. . . . [I]t may be said, generally, that the legislation of a State, not directed against any commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or inter-State, or in any other pursuit. In our judgment, the statute of Indiana falls under this class.

Id. at 104. The Court emphasized that "[u]ntil Congress, therefore, makes some regulation touching the liability of parties for marine torts resulting in the death of the

persons injured, we are of the opinion that the statute of Indiana applies. . . ." *Id.*

Thus, by the time of *The Harrisburg*, the Court had already upheld the application of state created wrongful death remedies in maritime tort actions.[5] And while *The Harrisburg* held that the general maritime law did not recognize an action for wrongful death (its *ratio decidendi* being that no such action lay at common law, *see* 119 U.S. at 213), it also recognized that the maritime law borrowed from land based law and where the latter recognized the cause of action, the admiralty would adopt that

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[5] The United States asserts that until *Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921), "[t]he federal courts . . . continued to struggle with that portion of *The Harrisburg*'s legacy that was undisturbed by Congress—the absence of a federal maritime cause of action for wrongful death of non-seamen occurring in the territorial waters." Br. U.S. *Am. Cur.* 10.

While both *Steamboat Co.* and *Sherlock* were brought in state court under the savings to suitors clause, both cases involved maritime torts subject to federal maritime law, with the Court rejecting arguments that the application of state wrongful death remedies interfered with the essential characteristics of admiralty law. *See supra* 6-8. Thereafter, numerous lower federal admiralty courts adopted state wrongful death statutes in suits brought both *in personam* and *in rem*. *See, e.g., The City of Norwalk*, 55 F. at 98; *The James Berwind*, 44 F. 693 (S.D.N.Y.), *rev'd on other grounds*, 49 F. 956 (2d Cir. 1891); *The St. Nicholas*, 49 F. 671 (S.D.Ga. 1891); *The Oregon*, 45 F. 62 (D. Or. 1891), *rev'd on other grounds*, 158 U.S. 186 (1895); *The E.B. Ward, Jr.*, 17 F. 456 (C.C.E.D. La. 1883); *The Sylvan Glen*, 9 F. 335 (E.D.N.Y. 1881); *The Garland*, 5 F. 924 (E.D. Mich. 1881); *Holmes v. Oregon & C. Ry. Co.*, 5 F. 75 (D. Or. 1880); *In re Long Island Transp. Co.*, 5 F. 599 (S.D.N.Y. 1881).

Whatever doubt remained as to the propriety of applying state wrongful death remedies in federal admiralty court was put to rest in *The Corsair*, 145 U.S. 335, 347-48 (1892), some thirty years before *Western Fuel*. While *The Corsair* upheld the dismissal of a wrongful death suit brought *in rem* because the state law had not created a lien against the "offending thing" (which was a jurisdictional prerequisite to an *in rem* proceeding), it also made clear that "[i]f [the state law] merely gives a right of action *in personam* for a cause of action of a maritime nature, the District Court may administer the law by proceedings *in personam*." *Id.* at 347.

rule. As the Court stated, "no country . . . had adopted a different rule on this subject for the sea from that which it maintains on the land, and the maritime law, as accepted and received by maritime nations generally, leaves the matter untouched." 119 U.S. at 213. As the *City of Norwalk* explained:

> . . . since the maritime courts in each country follow their own municipal law as regards giving damages for death; and inasmuch as by the common law of this country such a cause of action does not survive,—the latter rule must, therefore, obtain in our courts of admiralty. In other words, it is the municipal law that on such a point determines the law applicable in a court of admiralty.

55 F. at 108.

Accordingly, the unavailability of a wrongful death remedy was never viewed as being one of the "characteristic features of the general maritime law" which was to be shielded from state laws which "work[ed] material prejudice" to it or which "interfere[d] with the proper harmony and uniformity of that law in its international and interstate relations." *Jensen*, 244 U.S. at 216. To the contrary, in this context, the maritime law embraced whatever law was established by the controlling jurisdiction notwithstanding any disuniformity which might arise.

Thus, in *La Bourgogne*, 210 U.S. 95, 138-39 (1908), this Court held that wrongful death claims could be brought against a French vessel for a tort occurring on the high seas because French law recognized the right to recover for wrongful death; contemporaneously the courts of Holland, Germany, and Scotland enforced wrongful death remedies in maritime tort actions. Robert M. Hughes, *Handbook of Admiralty Law* § 110, at 224-26 (2d ed. 1920) (cited in *Just*, 312 U.S. at 388 n.8). Yet at the same time the admiralty courts of England, the leading seafaring nation of the period, did not recognize the existence of a wrongful death remedy under the general maritime law. *See The Harrisburg*, 119 U.S. at 205;

The Vera Cruz, 10 App. Cas. 59 (H.L. 1884); *see also* Hughes, § 111, at 227.

It is thus no surprise that *Jensen*, the very decision which is the source of petitioners' entreaty that the essential uniformity of maritime law requires the preemption of state wrongful death remedies, *see* Pet. Br. 39-43, itself recognized that these remedies were among those state laws which could modify the general maritime law. *See Jensen*, 244 U.S. at 216.[6] As this Court stated in *Western Fuel*:

> where death upon such waters follows from a maritime tort committed on navigable waters within a state whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel in personam for the damages sustained by those to whom such right is given. The subject is maritime and local in character and the specified modification of or supplement to the rule applied in admiralty courts when following the common law, will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations.

257 U.S. at 242. *See also Just*, 312 U.S. at 392 ("Uniformity is required only when the essential features of an exclusive federal jurisdiction are involved. But as admiralty takes cognizance of maritime torts, there is no repugnancy to its characteristic features either in permit-

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[6] The United States and the MLA invoke *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1875), in support of their contention that the Constitution contemplates "a system of [maritime] law coextensive with, and operating uniformly in, the whole country." *See* Br. U.S. 13, 14; Br. *Am. Cur.* MLA 6. Yet *The Lottawanna* upheld state authority to create liens on vessels in favor of those furnishing repairs and supplies, which were enforceable in admiralty, notwithstanding its concern that it would "be far more satisfactory to have a uniform law regulating such liens." 88 U.S. (21 Wall.) at 581. The Court instead left it to Congress to determine whether the interest in uniformity required a single Federal rule. *Id.* at 581-82; *see also id.* at 576-77.

ting recovery for wrongful death or in allowing compensation for a wrong to the living to be obtained from a tortfeasor's estate."). And in *Romero* the Court observed: "State remedies for wrongful death and state statutes providing for the survival of actions, both historically absent from the relief offered by the admiralty, have been upheld when applied to maritime causes of action. Federal courts have enforced these statutes." 358 U.S. at 373.

As the foregoing demonstrates, the general maritime law has never viewed the subject matter of wrongful death remedies as being one of its "characteristic features" or the provision of state remedies as "interfer[ing] with the proper harmony and uniformity of that law in its international or interstate" relations. *Jensen*, 244 U.S. at 216. Rather, throughout the world, admiralty law traditionally has looked to shoreside law, whether statutory or common law, to determine if a claimant in a maritime tort action was entitled to recover for wrongful death, a practice which this Court also has long endorsed through the application of state wrongful death remedies to suits in admiralty.

To argue then, as petitioners do, that the essential uniformity of admiralty law requires that the judicially created *Moragne* remedy preempt continued application of state wrongful death statutes to suits arising out of incidents occurring in a State's territorial waters, is to ignore that the legal consequence for causing a tortious death has never been "a matter of global concern requiring uniformity under general maritime law." *American Dredging Co. v. Miller*, 114 S.Ct. 981, 990 (1994). Indeed, given that the fundamental premise underlying the Constitution's grant of admiralty jurisdiction to the federal courts was the admiralty law's international character, *see, e.g.*, The Federalist No. 80, at 447 (Alexander Hamilton) (Isaac Kramnick ed., 1987)[7], petitioners' argu-

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[7] It is generally recognized that the framers' decision to vest the admiralty and maritime jurisdiction in the federal courts was prompted by the understanding of the international character of the maritime law. *See, e.g.*, Preble Stolz, *Pleasure Boating and*

ment amounts to nothing more than a plea for the return of federal common lawmaking in the manner of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), albeit under the guise of *Southern Pacific v. Jensen*. *See* Pet. Br. 31 ("the remedy is to be determined under a uniform system of federal common law, regardless of who is killed or where the accident takes place"). Putting aside that *Jensen* acknowledged the validity of the admiralty's applying the very type of state statutes which petitioners now challenge, *see* 244 U.S. at 216, reviving its doctrine to invalidate state wrongful death and survival remedies is unwarranted for numerous reasons.

First, denying suitors their state wrongful death and survival remedies violates the savings to suitors clause which, as the Court held in *Steamboat Co. v. Chase*, pre-

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Admiralty: Erie at Sea, 51 Cal. L. Rev. 661, 669-70 (1963); David P. Currie, *Federalism and the Admiralty: "The Devil's Own Mess"*, 1960 Supreme Ct. Rev. 158, 163-64; *Cf. Luke v. Lyde*, 2 Burr. 882, 887, 97 Eng. Rep. 614, 617-18 (K.B. 1759) (opinion of Lord Mansfield, C.J.) (characterizing the maritime law as "not the law of a particular country, but the general law of nations"). *See also* The Federalist No. 80, at 447 (Alexander Hamilton) (Isaac Kramnick ed., 1987); 3 Jonathan Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 532 (2d ed. 1907) (Statement of James Madison).

Whether or not one accepts the view that the framers intended for the admiralty and maritime jurisdiction to encompass the model of private litigation which it has evolved into, *see* William R. Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates*, 37 Am. J. Legal Hist. 117 (1993) (arguing that framers' concern was to provide a federal forum competent to adjudicate matters of sovereign interest such as prize cases, crimes committed on the high seas, and revenue cases, not private disputes which were considered unimportant), it is clear that the principal concern of the jurisdictional grant was uniform enforcement of those principles of admiralty which were of international character. But as Justice Holmes observed, "The maritime law is not a corpus juris—it is a very limited body of customs and ordinances of the sea." *Jensen*, 244 U.S. at 220 (dissenting). Where a particular subject matter is not part of this "very limited body" of law and custom, state law governing that subject matter should be evaluated under traditional dormant commerce clause and preemption principles.

serves these remedies notwithstanding that they did not exist at the time of the Judiciary Act's enactment. *See* 83 U.S. (16 Wall.) at 533. Indeed, given that the Court in *Moragne* exercised its common law powers to create a wrongful death remedy reasoning that such remedies are now part of the fabric of the common law, *see* 398 U.S. at 391-93, it is difficult to understand why state wrongful death and survival remedies are no longer saved to suitors under the Judiciary Act of 1789, 1 Stat. 76, § 9, 28 U.S.C. § 1333(1), as the Court held in *Steamboat Co. v. Chase*. To maintain then, as the United States does, that the admiralty's application of state wrongful death remedies is merely a "historical anomaly" for which "there is no longer any justification," Br. U.S. 6, is to ignore that the savings clause expressly preserves them.[8] *See Romero*, 358 U.S. at 361-62.

Extending *Jensen* to the realm of state wrongful death remedies would also mark an undue intrusion into the sovereignty of the States to exercise their police power for the protection of the safety and lives of their citizens. The Court has observed, however, that *Jensen* and its progeny, *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920), "have been limited by subsequent holdings of this court" and "marked isolated instances" of admiralty common law rules preempting state law. *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 338 (1973).

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[8] *Jensen*, of course, struck down a state workers' compensation scheme on the ground that it was a remedy "of a character wholly unknown to the common law." 244 U.S. at 218. The Court in *Steamboat Co. v. Chase*, however, had earlier rejected this argument with respect to state wrongful death statutes notwithstanding that these remedies did not exist at the time of enactment of the Judiciary Act, 1 Stat. 76. *See* 83 U.S. (16 Wall.) 533. *Moragne*'s conclusion that recovery for wrongful death "has become itself a part of our law," 398 U.S. at 390-91; *see also id.* at 392-93, reaffirms the conclusion that state remedies for wrongful death are saved to suitors. It would be incongruous to hold that wrongful death remedies are part of the common law for purposes of creating such a remedy, *see id.* at 390-93, but are not part of the common law's remedies for purposes of the savings clause.

Moreover, reviving *Jensen* is unwarranted given that under our Constitution, state laws regulating maritime affairs remain subject both to the restraints of the dormant commerce and due process clauses as well as preemption through either legislative action or the treaty power. *See American Dredging*, 114 S.Ct. at 991-92 (Stevens, J., concurring in part and concurring in the judgment). As the Court stated in *The Lottawanna*, "we must always remember that the court cannot make the [maritime] law, it can only declare it. If, within its proper scope, any change is desired in its rules, other than those of procedure, it must be made by the legislative department." 88 U.S. (21 Wall.) at 576-77; *see also id.* at 581-82; *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990) ("Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation."). And with respect to the specific question of whether the judicially created *Moragne* remedy preempts state wrongful death remedies, invoking such vague notions as the need for uniformity is all the more untoward because Congress has expressly left to the States the subject matter of the remedy for the wrongful death of a non-seaman (other than longshoremen and harbor workers, *see* 33 U.S.C. §§ 901-950) in the territorial waters.

II. CONGRESS HAS EXPRESSLY LEFT TO THE STATES THE SUBJECT MATTER OF THE REMEDY FOR THE WRONGFUL DEATH OF A NON-SEAMAN OCCURRING IN TERRITORIAL WATERS

In 1920, Congress legislatively altered the maritime law with the enactment of two statutes which created wrongful death remedies applicable in many maritime tort actions. *See Miles*, 498 U.S. at 23-24. The Death on the High Seas Act (DOHSA) provides a remedy to the "wife, husband, parent, child or dependent relative" for the death of any person "caused by wrongful act, neglect or default occurring on the high seas beyond a marine

league from the shore of any State." 46 App. U.S.C. §§ 761, 762. The Jones Act, 46 App. U.S.C. § 688, incorporated the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, to provide a wrongful death remedy "in favor of the personal representative of a seaman killed in the course of employment," *Miles*, 498 U.S. at 23-24, which applies even when the tort occurred within a State's territorial waters. *See Lindgren v. United States*, 281 U.S. 38, 44-47 (1930).

When applicable, DOHSA and the Jones Act supersede a State's wrongful death remedies. *See Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 230-32 (1986) (DOHSA); *Lindgren*, 281 U.S. at 44-47. Respondents' decedent, however, was not a seaman subject to the Jones Act. And with respect to non-seamen, the Court has acknowledged that "Congress was careful to make the Death on the High Seas Act applicable only outside state territorial waters so as not to intrude on state legislative competence." *Romero*, 358 U.S. at 374 n.42 (citation omitted); *see also Moragne*, 398 U.S. at 399-400.

Indeed, in enacting the DOHSA, Congress made clear in two separate provisions its purpose of preserving state wrongful death remedies for those torts which occurred within territorial waters. Thus, Section 1, which created DOHSA's right of action, expressly limits it to "the death of a person . . . occurring on the high seas beyond a marine league from the shore of any State . . . ." 46 App. U.S.C. § 761. Section 1's "reach . . . was explicitly limited to actions arising from accidents on the high seas, so as to 'prevent the Act from abrogating by its own force, the state remedies then available in state waters.'" *Offshore Logistics*, 477 U.S. at 224 (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 621-22 (1978)) (citation omitted). As the Senate Report explains, "[t]he right is made exclusive for deaths on the high seas, leaving unimpaired the rights under State statutes as to deaths on waters within the territorial jurisdiction of the States." S. Rep. No. 216, 66th Cong., 1st Sess. 3 (1919) (quoting letter of Judge Harrington Putnam); *see also*

H.R. Rep. No. 674, 66th Cong., 2d Sess. 3 (1920) (same).

DOHSA contains an additional provision, Section 7, 46 App. U.S.C. § 767, entitled "Exceptions from operation of chapter," which provides further evidence of Congress' purpose of preserving state wrongful death remedies for those torts occurring within a State's territorial waters. This section, which the Court has characterized as "a product of perhaps overabundant caution," *Offshore Logistics*, 477 U.S. at 223, expressly preserves state remedies:

> The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State . . . .

46 App. U.S.C. § 767.

As the Court has observed, Section 7 was enacted in response to *Jensen* and the "fear that absent a saving clause specifically recognizing the continued viability of this type of action, state wrongful death remedies on territorial waters might be deemed beyond the competency of state courts." *Offshore Logistics*, 477 U.S. at 224. Only three years earlier *Jensen* had held that a state workers' compensation scheme was "of a character wholly unknown to the common law" and thus was not "saved to suitors" under the Judiciary Act of 1789, § 9, 1 Stat. 76. *See* 244 U.S. at 218. Because wrongful death statutes were also unknown to the common law, *see The Harrisburg*, 119 U.S. at 213-14, Section 7 was enacted to "ensure[] that the Act saved to survivors of those killed on territorial waters the ability to pursue a state wrongful death remedy in state court." *Offshore Logistics*, 477 U.S. at 225.

The United States, in contrast to its position in *Moragne*,[9] now asserts that Section 7 has little signifi-

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[9] In *Moragne*, the United States argued that Section 7:

cance. In the United States' view, Section 7 "serves merely 'as a *jurisdictional* savings clause.'" *See* Br. U.S. *Am. Cur.* 20 (quoting 477 U.S. at 221). In other words, it preserves the availability of a state forum but does not save the state remedy from preemption.

The Court, however, has continued to recognize that Section 7 does more than preserve a state forum for a DOHSA claim. Rather, it also reflects a congressional purpose to preserve state wrongful death remedies for those torts which occur in territorial waters. *See Offshore Logistics*, 477 U.S. at 224-25. Thus, when Congress considered the issue of whether the federal maritime law should preempt state wrongful death remedies, it limited the scope of that preemption to those torts occurring on the high seas and expressly authorized the continuation of the practice of applying state wrongful death remedies to those torts occurring on territorial waters. *Cf. Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 317-21 (1955) (rejecting application of admiralty law to insurance dispute noting that Congress had expressly authorized state insurance regulation); *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 319 (1852) (upholding state law imposing liability for failing to use pilot noting that Congress had expressly authorized state regulation).

Minimizing the significance of the DOHSA as an expression of Congress' purpose to preserve state remedies

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> manifests a legislative purpose that State laws governing wrongful death should continue to be available, according to their terms, where no remedy is provided by the Death on the High Seas Act. But neither the language of the Act, nor its legislative history, gives any indication that this preservation of State law was intended by Congress to preclude the federal courts from vindicating the peculiarly federal, maritime interest at issue in this case—namely, the right of a person acting as a seaman to be supplied a seaworthy vessel on which to work.
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> Br. U.S. *Am. Cur.* 18, *Moragne*, 398 U.S. 375 (No. 175 O.T. 1969) (citation omitted).

in territorial waters, the United States contends that "Section 7 does not suggest that state remedies applicable to deaths in territorial waters would continue to apply notwithstanding the creation of the general federal maritime remedy for wrongful death in *Moragne*." Br. U.S. *Am. Cur.* 20. This argument is flawed in multiple respects.

First, it attributes to Congress an extraordinary degree of prescience. It ignores that Congress legislated against a jurisprudential background that included this Court's decisions upholding the application of state wrongful death and survival remedies to maritime torts, *see Sherlock*, 93 U.S. at 104; *Steamboat Co. v. Chase*, 83 U.S. (16 Wall.) at 533, as well as the values of *stare decisis*. *See supra*, pp. 6-8.

It likewise ignores that the impetus for the creation of the *Moragne* remedy—the emergence of the strict liability doctrine of unseaworthiness—had not been held to impose on a vessel owner an absolute duty, independent of negligence, until this Court's decision in *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944), and *Seas Shipping Co., Inc. v. Sieracki*, 328 U.S. 85 (1946), a quarter century after the DOHSA's enactment. *See Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 548-49 (1960). In enacting the DOHSA, Congress simply had no reason to anticipate the Court's creation of a federal maritime remedy for wrongful death fifty years in the future. Indeed, *Moragne* took a far more restrained approach than that which the United States argues for here, reasoning only that the DOHSA did not intend to preserve state remedial schemes which denied recovery for the evolving and uniquely federal maritime duty of seaworthiness. *See* 398 U.S. 397-400; *see also* pp. 20-23 *infra*.

Moreover, if Congress had viewed the existing state wrongful death remedies as being either inadequate in their coverage or as providing excessive redress, it could have made the DOHSA remedy applicable to those torts occurring on territorial waters and preempted state law. Its failure to do so is especially significant given that the

same Congress enacted not only the DOHSA, thus extending a wrongful death remedy to the high seas where state remedies were frequently inadequate, *see Offshore Logistics*, 477 U.S. at 213-14, but also the Jones Act, which applies in territorial waters and limits recovery to pecuniary loss preempting more generous state remedies. As the Court observed in *Moragne*, the state remedies which the DOHSA left undisturbed in territorial waters "not only were familiar but also may actually have been more generous than the remedy provided by the new Act." 398 U.S. at 398. If, as petitioners and their *amici* argue, there is a national interest in having a uniform federal wrongful death remedy limited to pecuniary loss, then Congress should make that choice.

Indeed, were Congress to enact legislation providing a remedy for wrongful death on territorial waters, this Court would assess its preemptive effect " 'start[ing] with the assumption that the historic police powers of the States [are] not to be superseded by . . . [a] Federal Act unless that [is] the clear and manifest purpose of Congress.' " *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608, 2617 (1992) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). In the event the statutory scheme contained an express preemption provision, the Court would "fairly but—in light of the strong presumption against pre-emption—narrowly construe the precise language" of the provision. *Id.* at 2621. And in assessing any claim of conflict or implied preemption, the Court would "never assume[] lightly that Congress has derogated state regulation, but instead . . . address[] claims of pre-emption with the starting presumption that Congress does not intend to supplant state law." *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S.Ct. 1671, 1676 (1995). In short, the reluctance to find preemption and the requirement that Congress provide clear and unambiguous evidence of such purpose is born out of respect for the principles of federalism and state sovereignty embodied

in the text and structure of the Constitution. *Cipollone*, 112 S.Ct. at 2625-26 (Blackmun, J., joined by Kennedy, J., and Souter, J., concurring in part, concurring in the judgment in part and dissenting in part); *cf. Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255-57 (1984) (Atomic Energy Act did not preempt state law punitive damages award).

The high degree of restraint exercised by the Court in statutory preemption cases is even more appropriate where, as here, the rule which assertedly preempts the States' police powers is not the product of legislative enactment but of judicial lawmaking. For when Congress acts, the States can use whatever political influence they have to limit the preemptive scope of a statute. And Congress, with its superior fact finding resources, is better suited to determine whether the federal interest in interstate uniformity requires the preemption of state laws.

III. THE *MORAGNE* REMEDY DOES NOT PREEMPT STATE WRONGFUL DEATH REMEDIES

Ignoring the role of the States in our federal system, petitioners and their *amici* view the judicially created *Moragne* remedy as a decisive broadside on the admiralty tradition of applying state wrongful death and survival remedies. *See* Pet. Br. 31. In their view, state law has no place in deciding the wrongful death claims for a nonseaman arising from a tort occurring within a State's territorial jurisdiction. *Id.* As explained below, assigning this broad preemptive force to *Moragne* finds no support in the analytical justification on which the decision rested and ignores the States' substantial interest in regulating tortious conduct occurring within their borders. *Moragne* can and should be read in a manner which accommodates the interests of both the States and the Federal Government.

In *Moragne*, the widow of a longshoreman brought a wrongful death suit against a vessel owner alleging separate counts of negligence and unseaworthiness of the

vessel. 398 U.S. at 376. The defendants in the suit, the vessel owners and the impleaded decedent's employer, moved to dismiss the unseaworthiness count on the ground that *The Harrisburg* barred relief under the general maritime law and that, under Florida's wrongful death statute, unseaworthiness was not a basis of liability. *Id.* The district court granted the motion and the court of appeals affirmed. *Id.* at 376-77.

This Court reversed, overruling *The Harrisburg*. In particular, the Court noted three anomalies which had arisen with the admiralty's recognition of the absolute and distinctly maritime duty to provide a seaworthy vessel (a duty which has never been extended to non-seamen/passengers). Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 4-5, at 134 (1987). By 1970, "[t]he unseaworthiness doctrine ha[d] become the principal vehicle for recovery by seamen for injury or death, overshadowing the negligence action made available by the Jones Act, and . . . ha[d] achieved equal importance for longshoremen and other harbor workers to whom the duty . . . was extended because they perform work on the vessel traditionally done by seamen." *Moragne*, 398 U.S. at 399 (citations omitted). The Court was thus properly concerned with the existing incongruities which prevented the full vindication of this uniquely federal duty and which, in some instances, denied those to whom the duty was owed a remedy for wrongful death.[10]

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[10] The Court set forth the three anomalies as follows: The first was that "within territorial waters, identical conduct violating federal law . . . produces liability if the victim is merely injured, but frequently not if he is killed." 398 U.S. at 395. The second was that "identical breaches of the duty to provide a seaworthy ship, resulting in death, produce liability outside the three mile limit [where the DOHSA applied] but not within the territorial waters of a State whose local statute excludes unseaworthiness claims." *Id.* (citation omitted). The third was that a seaman "covered by the Jones Act—is provided no remedy for death caused by unseaworthiness within territorial waters, while a longshoreman, to whom the duty of seaworthiness was extended . . . does have such a remedy when allowed by a state statute." *Id.* at 395-96.

The *Moragne* Court made clear, however, that its purpose in creating a wrongful death remedy under the general maritime law was to effectuate this uniquely federal duty and not to otherwise preempt state wrongful death remedies. As the Court stated, "[o]ur recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to *exclusively maritime substantive concepts.*" 398 U.S. at 401 (emphasis added). The Court further observed:

> The incongruity of forcing the States to provide the sole remedy to effectuate duties that have no basis in state policy is highlighted in this case. The Florida Supreme Court ruled that the state wrongful-death act was concerned only with "traditional common-law concepts," and not with "concepts peculiar to maritime law such as 'unseaworthiness' and the comparative negligence rule." It found no reason to believe that the Florida Legislature intended to cover, or even considered, the "completely foreign" maritime duty of seaworthiness. Federal law, rather than state, is the more appropriate source of a remedy for violation of the federally imposed duties of maritime law.

398 U.S. at 401 n.15 (citation omitted).[11]

As explained above, the uniquely federal maritime doctrine of unseaworthiness imposes a duty on a vessel owner vis-a-vis seamen and a limited class of maritime employees.[12] It provides no redress to persons such as the

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[11] It bears noting that in *Moragne*, the defendants did not challenge the plaintiff's right to pursue a wrongful death claim based on negligence because Florida's statute encompassed this duty. *See* 398 U.S. at 376.

[12] In 1972, Congress amended the Longshore and Harbor Workers' Compensation Act (LHWCA), 86 Stat. 1251, 33 U.S.C. §§ 901-950, abrogating the right of covered employees to recover from vessel owners for injury and death under the unseaworthiness doctrine, thus rendering *Moragne* inapplicable on its facts. *See Miles*, 498 U.S. at 28.

decedent, a recreational user of watercraft, or for that matter, passengers and guests on either recreational or commercial vessels. It is thus implausible that in creating a remedy to vindicate a uniquely federal policy, the Court intended to preempt the application of state wrongful death statutes even where, as here, the underlying duties which have been breached—negligence, strict liability, and breach of implied warranties of merchantability and fitness for purpose in the design and sale of a product—are not exclusively federal. To do so is to ignore that "[t]he State and Federal Governments jointly exert regulatory powers today as they have played joint roles in the development of maritime law throughout our history" and that "allocations of jurisdiction have been carefully wrought to correspond to the realities of power and interest and national policy." *Romero*, 358 U.S. at 374-75; *see also Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960) ("[T]he states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government.").

To be sure, admiralty courts have incorporated these duties into the general maritime law. *See, e.g., East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 865-66 (1986). But to decide that these duties are within the cognizance of admiralty is not to render them the subject of exclusive federal interest. To the extent that the breach of these duties violates state law and occurs within a State's territorial jurisdiction, the States retain a substantial interest in enforcing them. Consistent with the reasoning of *Moragne* itself, the Court should hold that the general maritime remedy for wrongful death provides a remedy for the breach of an exclusively federal duty but does not preempt a state remedy when the underlying duty is cognizable under state law.[13]

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[13] Petitioners cite *Miles* arguing that it "specifically concluded that '*Moragne* intended to create a general maritime wrongful death action applicable *beyond the situation of longshoremen.*'" Pet. Br. 22 (quoting 498 U.S. at 30) (emphasis added by petition-

IV. THE *MORAGNE* REMEDY SHOULD NOT BE EXTENDED TO PREEMPT STATE WRONGFUL DEATH REMEDIES

As explained above, *Moragne* and *Miles* were limited holdings recognizing a wrongful death remedy under the general maritime law in order to vindicate the uniquely federal duty of a vessel owner to provide seamen (and formerly longshoremen) with a seaworthy vessel. Moreover, the various policy arguments put forth by petitioners and their *amici* provide no justification for the Court to disregard the congressional judgment manifested in the DOHSA to preserve state wrongful death remedies for torts occurring in the territorial waters. They likewise fall far short of the threshold this Court has traditionally required for overruling its prior decisions, a relevant inquiry given the numeous cases such as *Sherlock* and *Steamboat Co. v. Chase* upholding the application of state wrongful death remedies to maritime torts. Aside from these considerations, the arguments are not persuasive in their own right.

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ers); *see also* Br. U.S. *Am. Cur.* 22. *Miles*, however, involved a seaman, a person to whom the uniquely maritime duty of seaworthiness is owed. *See Mahnich*, 321 U.S. at 103; *see also Miles*, 498 U.S. at 21-28. The situation was thus analogous to that in *Moragne* (notwithstanding that in 1972 Congress amended the LHWCA to bar longshoremen from suing vessel owners for unseaworthiness), in that with the evolution of the distinctly maritime duty of seaworthiness, federal law should provide the remedy for its breach. *See id.* at 21-30. *Miles* did not hold that the *Moragne* remedy was applicable to persons such as the decedent here and has preclusive effect. *See id.* at 37 ("We hold that there is a general maritime cause of action for the wrongful death of a seaman[.]").

Nor does *Miles'* holding barring the recovery of non-pecuniary damages under the *Moragne* action aid petitioners. As the Court recognized, it is not free to fashion federal maritime law as it pleases but must respect Congress' judgment. *See* 498 U.S. 32-33; 36-37. Because Congress expressly made the judgment to preserve state wrongful death remedies in the territorial seas, *see supra* pp. 14-19, and this case does not involve the uniquely maritime duty of seaworthiness, state remedies must be recognized in admiralty.

The United States, for example, asserts that applying state wrongful death remedies that provide "a more generous measure of damages than the federal remedy . . . would create at least three unjustifiable 'anomalies' . . . similar to those that *Moragne* sought to eliminate." Br. U.S. 17. According to the United States, these anomalies are that: (1) "identical breaches of maritime duties would be subject to different measures of damages, solely because the victim of one breach was killed whereas the victim of another was injured"; (2) "beneficiaries of persons killed in territorial waters would have access to supplemental state remedies but beneficiaries of persons killed in identical accidents on the high seas would not"; and (3) "beneficiaries of non-seamen would likewise in some cases be eligible for a broader range of remedies than beneficiaries of seamen." *Id.* This argument is meritless.

As for the latter two purported anomalies, the United States ignores that the less favorable treatment accorded DOHSA and Jones Act claimants were the choices Congress made in enacting these statutes. As explained above, in the case of the DOHSA, Congress both preserved and preempted state remedies depending upon the situs of the tort; in the case of the Jones Act, Congress preempted state remedies depending upon the status of the employee. *See supra* 14-19.

With respect to the more favorable treatment accorded the survivors of those killed in territorial waters vis-a-vis those killed on the high seas, the United States ignores that the DOHSA authorizes a greater recovery even on the high seas when the law of a foreign State permits it. *See* 46 App. U.S.C. § 764. As Section 4 provides, "[w]henever a right of action is granted by the law of any foreign State . . . such right may be maintained . . . without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding." *Id.* Under this section, admiralty courts have upheld awards for non-pecuniary damages including pain and suffering and mental distress

where permitted by foreign law notwithstanding the DOHSA's general prohibition of such recoveries. *See Noel v. Linea Aeropostol Venezolana*, 260 F. Supp. 1002, 1006 (S.D.N.Y. 1966). Given that Congress affirmatively sanctioned greater recoveries under foreign law notwithstanding the fortuity of such, it is entirely justifiable that the beneficiaries of those killed within a State's territorial jurisdiction recover the full measure of damages provided by its law.

With respect to the treatment accorded seamen and non-seamen, statutory law such as the Federal Employers Liability Act (which the Jones Act incorporates) and state workers' compensations statutes have long precluded employees from recovering from their employers the full scope of common law damages. Dan B. Dobbs, *Torts And Compensation* 742 (1985). Given that tort law has long provided different and less extensive remedies for injury occurring within the employment relationship than it does under the common law, it would be aberrant if the admiralty did not recognize a similar dichotomy. Moreover, while the United States professes solicitude for the welfare of seamen, its position would deny their survivors the full measure of damages in third party suits such as those that might be brought against the manufacturers of defective safety equipment.

No more persuasive is the United States' contention that state remedies should be preempted because "identical breaches of maritime duties would be subject to different measures of damages, solely because the victim of one breach was killed whereas the victim of another was injured."[14] Br. U.S. *Am. Cur.* at 17. This is largely a

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[14] The cases on which this argument is premised provide no support for the broad reading given them by the United States. Two involved personal injuries incurred by seamen, *see Carlisle Packing Co. v. Sandanger*, 259 U.S. 255 (1922); *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372 (1918); others involved different liabilities of commercial shipping interests. *See Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959) (action by guest of crew member against vessel owner); *Pope & Talbot,*

distinction without a difference because the maritime law generally authorizes the recovery of the types of damages traditionally available under state law such as those for pain and suffering, loss of society, and punitive damages. *See* Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 4-12, at 142-43; § 4-14, at 145 (1987).

To the extent there is a substantive difference between the damages available under state and federal law, this incongruity can be as effectively cured by recognizing the authority of the States under the savings clause to set the measure of damages for those personal injury actions not resulting in death which occur within their waters and which are not otherwise subject to the Jones Act or LHWCA. *Cf. Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272 (1959) (per curiam) (employee injured while working on barge in navigable waters could pursue state law negligence claim). This approach would be consistent with the expectations of recreational boaters, who register their vessels with their States, *see* 46 U.S.C. § 12301, are subject to extensive state boating safety regulation, *see* Appendix, and to prosecution under state law for criminal acts committed within territorial waters not-

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Inc. v. Hawn, 346 U.S. 406 (1953) (unseaworthiness claim by repair worker against vessel owners); *Workman v. City of New York*, 179 U.S. 552 (1900) (suit by owner of British barkentine for damages sustained in collision). These cases thus involved traditional concerns of admiralty law.

The remaining cases, which are products of the *Jensen* era, involved personal injuries incurred by shipyard workers while working on completed vessels. *See Messel v. Foundation Co.*, 274 U.S. 427 (1927); *Robins Dry Dock & Repair Co. v. Dahl*, 266 U.S. 449 (1925). But as Gilmore and Black explain, the Court subsequently held that "repair work on a completed vessel was within the twilight zone [of overlapping state and LHWCA coverage], with the result that the state compensation commission was required to make an award in such a case if the injured worker elected to pursue his state remedy." Gilmore and Black, at 421. These cases thus do not support the United States' broad assertion that "the interest in maritime uniformity has long been held to preclude the application of state remedies" for tortious injuries which do not result in death. Br. U.S. *Am. Cur.* 15.

withstanding the maritime locus of the act. *See* Stolz, *Pleasure Boating and Admiralty*, 51 Cal. L. Rev. at 667 n.27; 18 U.S.C. § 7, § 13. If States are competent to define, prosecute and punish criminal homicides committed in territorial waters, they are no less competent to provide civil remedies for wrongful death.[15]

Indeed, far from curing unjustifiable anomalies, adopting petitioners' proposed regime would lead to a stream of perverse results. Products such as a jet ski are commonly used not only in territorial waters which are within the admiralty's jurisdiction but also in inland waters (such as lakes) which are indisputably not. Under petitioners' regime, the heirs of one killed by a defective product on the navigable waters (such as respondents) would be denied the same measure of recovery as the heirs of one killed on inland waters notwithstanding that both deaths were caused by the same tortious act. But if both incidents occurred within the same State's territorial jurisdiction, there is no justification for the disparate treatment. A notion as amorphous as the need for uniformity plainly does not justify this Court's creation of a common law rule which allows a tortfeasor to externalize the costs of its conduct solely because the injury occurred on the navigable waters. *Cf.* William M. Landes & Richard A. Posner, *The Economic Structure Of Tort Law* 186-87 (1987). And surely admiralty tort law is as concerned

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[15] Petitioners suggest the existence of another anomaly in asking "What was to happen when a death occurred in waters at the border of two states—only one of which offered a maritime death remedy?" Pet. Br. 19. Petitioners do not, however, point to a single case in which this happened. *See id.* Moreover, today every State has enacted a wrongful death statute governing most if not all breaches of tort duties, *see Moragne*, 398 U.S. at 390; to the extent that a State may not recognize the duty of seaworthiness, *Moragne* fills the void.

Petitioners' further question—"Was it fair, in a federal system of law, for two claimants to receive different compensation under circumstances indistinguishable apart from their state citizenship?" (Pet. Br. 19)—is answered by, *inter alia*, the savings to suitors clause which preserves the right of suitors to their state remedies.

as state tort law with creating the proper incentives for reducing accidents.

Beyond these perverse results, because of the reach of the admiralty jurisdiction adopting petitioners' rule will prompt much wasteful litigation over whether seemingly inland bodies of waters are within it.[16] For example, an admiralty court properly declined to exercise jurisdiction over a tort occurring on Skaneateles Lake, one of New York State's finger lakes. *See Reynolds v. Bradley*, 644 F. Supp. 42 (N.D.N.Y. 1986). Yet under the Court's precedents, torts occurring a short distance away on the Cayuga and Seneca Lakes are within the admiralty jurisdiction because these lakes are connected to the New York State Barge Canal System. *Cf. The Robert W. Parsons*, 191 U.S. 17 (1903); *Ex Parte Boyer*, 109 U.S. 629 (1884).[17] As long as the legal consequences are to

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[16] This Court has long held that the admiralty jurisdiction encompasses those inland waters which "form, in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries." *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871). While the Court has required that inland waters be "navigable in fact," this standard is quite broad, encompassing waters not only "when they are used," but also when they are "susceptible of being used, in their ordinary condition, as highways for commerce." *Id.* That a body of water has numerous obstructions such as falls and rapids which require portages does not bar the exercise of admiralty jurisdiction. *See The Montello*, 87 U.S. (20 Wall.) 430, 440-43 (1874); Schoenbaum § 3-3, at 67 n.24. Nor does it matter that the "commerce" conducted was the floating of rafts of bundled lumber. *See, e.g., The Montello*, 87 U.S. (20 Wall.) at 441. As *The Montello* noted, "the true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted, nor the difficulties attending navigation." 87 U.S. (20 Wall.) at 441. "[T]he liberal definition given to 'customary modes of trade and travel on water,'" *Finneseth v. Carter*, 712 F.2d 1041, 1044 (6th Cir. 1983) (quoting *The Daniel Ball*, 77 U.S. (10 Wall.) at 563), suggests that numerous inland waters are within the admiralty jurisdiction.

[17] This example is by no means unique. There are numerous other inland lakes and waterways throughout the United States which are now subject to the admiralty jurisdiction. *See* Ralph

vary so significantly from admiralty to state jurisdiction, it is reasonable to expect that all courts, federal as well as state) will be inundated with litigation over such issues, an ironic result given that this Court most recently rejected a proposal to reformulate the admiralty jurisdiction test on the ground that it would "invit[e] complex argument in a trial court and a virtually inevitable appeal." *Jerome B. Grubart v. Great Lakes Dredge & Dock Co.*, 115 S.Ct. 1043, 1055 (1995).

Ironically, petitioners' proposed regime undermines the uniform application of wrongful death remedies by creating not two, but three remedial schemes applicable to recreational users of the waterways: (1) the DOHSA for the high seas, (2) a common law federal maritime remedy for the navigable waters within a State (whose measure of damages will, as in the common law itself, be the subject of continued litigation) and (3) the State's remedy for all other waterborne deaths. Federal courts, of course, do not have the power to create a common law applicable to all torts. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Thus, absent congressional preemption of state wrongful death remedies for inland tort claims, there is no possibility of ever having a uniform body of law governing Yamaha's conduct. The Court should therefore reaffirm the authority of the States to remedy all tortious waterborne deaths occurring within their jurisdiction.

CONCLUSION

The judgment of the court of appeals should be affirmed.

McCaughan, *Federal Maritime Jurisdiction Over Inland Intrastate Lakes*, 26 Wash. & Lee L. Rev. 1 (1969).

Respectfully submitted,

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September 15, 1995

APPENDIX

SELECTED STATE RECREATIONAL BOATING SAFETY STATUTES

Ala. Code §§ 33-5-1—33-5-36; 33-5-50—33-5-81
Alaska Stat. Ann. §§ 05.25.010—05.25.100
Ariz. Rev. Stat. Ann. §§ 5-301—5-396.01
Ark. Code Ann. §§ 27-101-101—27-101-107; 27-101-201—27-101-205
Cal. Harb. & Nav. §§ 651—668.1
Colo. Rev. Stat. §§ 33-13-101—33-13-114
Conn. Gen. Stat. §§ 15-121—15-140u
Del. Code Ann. tit. 23, §§ 2111—2126; 2201—2225; 2301—2308
Fla. Stat. Ann. §§ 327.01—327.803
Ga. Code Ann. §§ 52-7-1—52-7-51
Haw. Rev. Stat. §§ 267-1—267-15
Idaho Code §§ 67-7001—67-7050
Ill. Ann. Stat. ch. 625, ¶¶ 45/1-1—45/1-5; 45/2-1—45/2-5; 45/3-1—45/3-14
Ind. Code §§ 14-1-1-1—14-1-1-63
Iowa Code §§ 462A.1—462A.85
Kan. Stat. Ann. §§ 32-1101—32-1180
Ky. Rev. Stat. Ann. §§ 235.010—235.330
La. Rev. Stat. Ann. §§ 34:851.1—34:851.30
Me. Rev. Stat. Ann. tit. 12, §§ 7791—7805
Md. Nat. Res. §§ 8-701—8-814
Mass. Ann. Laws ch. 90b, §§ 1—19
Mich. Comp. Laws §§ 281.1001—281.1190
Minn. Stat. §§ 86B.001—86B.815
Miss. Code Ann. §§ 59-21-1—59-21-153
Mo. Ann. Stat. §§ 306.090—306.225
Mont. Code Ann. §§ 23-2-501—23-2-536
Neb. Rev. Stat. §§ 37-1201—37-1274
Nev. Rev. Stat. §§ 488.015—488.290; 488.355—488.365
N.H. Rev. Stat. Ann. §§ 270:1—270:74-b; 270-D:1—270-D:9
N.J. Stat. Ann. §§ 12:7-23.1—12:7-69
N.M. Stat. Ann. §§ 66-12-1—66-12-23

N.Y. Nav. Law §§ 40—49-a; 71-c—79
N.C. Gen. Stat. §§ 75A-1—75A-19
N.D. Cent. Code §§ 20.1-13-01—20.1-13.1-14
Ohio Rev. Code Ann. §§ 1547.01—1547.69
Okla. Stat. tit. 63, §§ 801—825
Or. Rev. Stat. §§ 830.005—830.550
30 Pa. Cons. Stat. Ann. §§ 5101—5104; 5121—5126; 5501—5504; 58 Pa. Code §§ 91.1—109.6
R.I. Gen. Laws §§ 46-22-1—46-22-22; 46-22.2-1—46-22.2-8; 46-27-1—46-27-4
S.C. Code Ann. §§ 50-21-10—50-21-170; 50-21-810—50-21-860
S.D. Codified Laws Ann. §§ 42-8-1—42-8-102
Tenn. Code Ann. §§ 69-10-101—69-10-224
Tex. Parks & Wild. Code Ann. §§ 31.001—31.129
Utah Code Ann. §§ 73-18-1—73-18-23
Vt. Stat. Ann. tit. 23, §§ 3301—3318
Va. Code Ann. §§ 29.1-734—29.1-750
Wash. Rev. Code §§ 88.12.010—88.12.275
W. Va. Code §§ 20-7-1—20-7-23
Wis. Stat. §§ 30.50—30.70
Wyo. Stat. §§ 41-13-202—41-13-219

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No. 94-1387

In The

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

REPRINTED COPY

YAMAHA MOTOR CORPORATION, U.S.A. and
YAMAHA MOTOR COMPANY, LTD.,

Petitioners,

v.

LUCIEN B. CALHOUN and ROBIN L. CALHOUN,
Individually and as Administrators of the
Estate of Natalie K. Calhoun, Deceased,

Respondents.

BRIEF AMICUS CURIAE ON BEHALF OF
ASSOCIATION OF TRIAL LAWYERS OF AMERICA
IN SUPPORT OF THE RESPONDENTS

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36 P

TABLE OF CONTENTS

Table of Contents..... i

Table of Authorities..... iii

Consent of Parties..... 2

Statement of Interest..... 2

Question Presented..... 3

Summary of Argument..... 3

Argument

I State statutes establishing the damages recoverable for wrongful death are not pre-empted by any federal statute, when considered in the context of a non-employment fatality occurring aboard a pleasure boat being operated in state territorial waters..... 6

II The damage remedies available for pleasure boat fatalities under applicable state statutes are not displaced by the general maritime law cause of action, applying to the deaths of seamen and longshoremen which was recognized by the court in *Moragne* and *Gaudet*..... 11

III Policy considerations mandate that state wrongful death statutes be applied in state water fatalities occurring outside of federally regulated employment..... 23

Conclusion..... 28

Certificate of Service..... 29

TABLE OF AUTHORITIES

American Dredging Co. v. Miller, 510 U.S.___, 114 S. Ct. 981 (1994)..... 14, 19, 24

Calhoun v. Yamaha Motor Corp., 40 F. 3rd, 622 (3rd Cir. 1994)..... 19

Ceres Terminals, Inc. v. Industrial Commission of Ill., 53 F. 3rd 183, 185 (7th Cir. 1995)..... 6

Choat v. Kawasaki Motors Corp., 1994 Amc. 2626 (Ala. 1994, application for rehearing pending).... 5, 27

The City of Norwalk, 55 F. 98 (S.D.N.Y. 1893)..... 12

Dennis v. Central Gulf S.S. Lines, 453 F. 2d 137 (5th Cir. 1972)..... 24

East River S.S. Corp. v. TransAmerican Delavell, 476 U.S. 858 (1986)..... 24

Foremost Ins. Co. v. Richardson, 457 U.S. 668 (1982)..... 24

Gillespie v. U.S. Steel Corp., 379 U.S. 148 (1964)..... 13

Greene v. Vantage S.S. Corp., 466 F. 2d 1059 (4th Cir. 1972)..... 5, 17, 24

Guevara v. Maritime Overseas Corp, 59 F. 3rd 1496 (5th Cir. 1995)..... 27

The Hamilton, 207 U.S. 398 (1907)..... 12

The Harrisburg, 119 U.S. 199 (1886)..... 11, 14, 15, 16

Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., _____U.S.____, 115 S. Ct. 1043, (1995)..... 3, 7, 24

Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944)..... 12

The Middlesex 253 F. 142 (Mass. 1916)..... 12

Miles v. Apex Marine Corp., 498 U.S. 19, (1990)..... 4, 7, 8, 17, 20, 21, 21, 24, 27

Mobil Oil Corporation v. Higgenbotham, 436 U.S. 618 (1978)..... 6, 10, 20

Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970)..... 3, 4, 11, 13, 16, 17, 20, 22, 23, 24

Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986)..... 3, 9

Oil, Chemical and Atomic Workers v. Mobil Oil Corp. 426 U.S. 407 (1976)..... 6

Panama R.R. Co. v. Johnson, 264 U.S. 375 (1924)..... 6

The Seagull, 21 F. Cas. 909 (4th Cir. 1865)..... 5, 25

Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 (1974)..... 3, 4, 11, 16, 16

Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946)..... 12, 13,

Sisson v. Ruby, 497 U.S. 358 (1990)..... 24

Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917)..... 6, 20

Tallentire v. Offshore Logistics, Inc., 754 F. 2d 1274 (1985)..... 3, 9, 10, 20, 22

The Tungus v. Skovgaard, 358 U.S. 588 (1959)..... 13

Wahlstrom v. Kawasaki Heavy Industry, Ltd., 4 F. 3rd 1084 (2nd Cir. 1993)..... 5, 27

Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 337 (1955)..... 11

STATUTES

Death on the High Seas Act,
46 U.S.C., 761, et seq. *8, 12, 15, 17*

Federal Employer's Liability Act,
45 U.S.C. 51, et seq. *12*

Jones Act, 46 U.S.C. 688 ..... *8, 12, 18*

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Respondents.

BRIEF AMICUS CURIE ON BEHALF OF ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE RESPONDENTS

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

CONSENT OF PARTIES

Pursuant to Rule 36 of the U.S. Supreme Court Rules, this Brief Amicus Curie is being filed with the written consent of all parties to the case, which will be separately filed with the court.

STATEMENT OF INTEREST

This Brief Amicus Curie is being submitted by the Association of Trial Lawyers of America, a National Bar Association consisting of more than 50,000 lawyers who primarily represent plaintiffs in personal injury and death litigation and worker's compensation claims. The Admiralty Law section of the Association includes most of the attorneys throughout the United States who specialize in maritime personal injury law.

The pending case is of great importance in that it will determine the extent to which state wrongful death statutes may be applied in cases involving fatalities occurring aboard pleasure vessels being operated in state waters. The decision will affect the outcome of many pleasure boat wrongful death cases now pending in the State and Federal Courts throughout the United States. We believe that, based on our research and analysis of the law and our experience in representing the victims of such accidents, our brief argument will be of assistance to the court.

Our brief will be limited to the following question presented, without any reference or review of the facts in this case.

QUESTION PRESENTED

Was the United States Court of Appeals for the Third Circuit correct in holding that the damages available to the family of the victim of a fatal recreational boating accident, occurring on navigable state territorial waters, are to be determined under applicable state statute?

SUMMARY OF ARGUMENT

I.

State states establishing the damages recoverable for wrongful death are not pre-empted by federal statutes, when considered in the context of a non-employment fatality occurring aboard a pleasure boat being operated in state waters. Congress has the power to pre-empt the entire field of maritime law, but has not done so. It is clear that admiralty courts sometimes to apply state law. *Jerome B. Grubart, Inc. v. Great Lakes, Dredge & Dock Co.*, _____*U.S.*____, *115 S. Ct. 1043, (1995)*. The Third Circuit was correct in finding that there is no federal statute pre-empting the application of damage remedies by state statute, since the Jones Act applies only to seamen and the Death on the High Seas Act excludes coverage of fatalities occurring within state waters. *Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986).*

II.

Damage remedies available for pleasure boat fatalities under applicable state statutes are not displaced by the general maritime law cause of action for seamen and longshoremen, which was recognized by the court in *Moragne* and *Gaudet*. It is clear that the court in those cases was acting to fill a gap in

the wrongful death remedy available for seamen and longshoremen which had resulted from a series of its earlier decisions and the enactment of the Death on the High Seas Act and the Jones Act by congress. This court recognized a general maritime law cause of action for death resulting from unseaworthiness in *Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970)*, and expanded upon it in *Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 (1974)*, in order to provide seamen and longshoremen with a remedy for wrongful death resulting from unseaworthiness. In doing so, the court was acting to preserve uniformity in the duties and liabilities which govern the conduct of the parties, but did not seek any uniformity in the elements of damages recoverable in differing circumstances. *Miles v. Apex Marine Corp., 498 U.S. 19 (1990)*. In the decision below, the Third Circuit correctly concluded that the decisions of this court in *Moragne, Gaudet* and *Miles* did not establish an admiralty principle applying outside the claims of seamen and longshoremen. The decisions of this court and the exclusionary language of DOHSA leave state law damage remedies available for pleasure boat fatalities occurring in state waters. The decision of the court below is due to be affirmed.

III.

Policy considerations mandate that state wrongful death statutes be applied in state water fatalities occurring outside of federally regulated employment. Maritime law does seek uniformity, but the necessary uniformity is in the law determining the primary duties governing the conduct of the parties. The decision in *Moragne* was motivated by a desire to

preserve uniformity so that the rules governing conduct would not be disturbed by the denial of recovery. *Greene v. Vantage S.S. Corp., 466 F. 2d 1059 (4th Cir. 1972).* However, neither this court nor congress have required uniformity in the assessment of damages recoverable for wrongful death.

In the balancing of interests in the question at hand, the court should consider that a state should have the right to expect that its wrongful death statutes will provide uniform principles of damage recovery for deaths occurring within its territory. Certainly, manufacturers of products should also expect uniformity of death remedies within the boundaries of a given state, and do not mold their conduct around the possibility that they may escape the reach of state statutes in some instances.

It better becomes the humane character of the admiralty to give the remedy allowed under state law, rather than withhold it, when not required to withhold state law remedies by established and inflexible rules. *The Seagull, 21 F. Cas. 909 (4th Cir. 1865).* This is particularly true since the damage remedies enacted in DOHSA and the Jones Act do not fit well in pleasure boat fatalities, where the victim is more often a child, housewife, or retired person who has no dependents. The application of the Jones Act pecuniary damage limitation to the non-employment death of a child on a jet ski would leave only a nominal remedy for wrongful death. *Wahlstrom v. Kawasaki Heavy Industry, Ltd., 4 F. 3rd 1084 (2nd Cir. 1993); Choat v. Kawasaki Motors Corp., 1994 Amc. 2626 (Ala. 1994, application for rehearing pending).* Pleasure boat fatalities would

become damnum absque injuria, a harsh result which could not have been intended by this court.

ARGUMENT

I.

STATE STATUTES ESTABLISHING THE DAMAGES RECOVERABLE FOR WRONGFUL DEATH ARE NOT PRE-EMPTED BY ANY FEDERAL STATUTE, WHEN CONSIDERED IN THE CONTEXT OF A NON-EMPLOYMENT FATALITY OCCURRING ABOARD A PLEASURE BOAT BEING OPERATED IN STATE TERRITORIAL WATERS.

Article III, §2 of the United States Constitution defines the judicial power of the United States as including "all cases of admiralty and maritime jurisdiction". Article I, §8, Clause 18, gives congress the power to "make all laws which shall be necessary and proper for carrying into execution . . . all . . . powers vested by this constitution and the government of the Untied States, or in any department or officer thereof." This court has held that these two constitutional provisions empower the congress to create a body of National Maritime Law. *Panama R.R. Co. v. Johnson, 264 U.S. 375 (1924); Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917).*

"Congress undoubtedly has power . . . to pre-empt the entire field of maritime law." *Oil, Chemical and Atomic Workers v. Mobil Oil Corp. 426 U.S. 407, 434-435 1976) (Stewart and Rehnquist, JJ. dissenting).* However, congress has not done so. "There is nothing remotely comparable [to field pre-emption] in the admiralty." *Ceres Terminals, Inc. v. Industrial Commission*

of Ill., 53 F. 3rd 183, 185 (7th Cir. 1995). Instead, the states have been left with a considerable legislative competence in the maritime field. Most recently, in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.,* ____*U.S.*____, *115 S. Ct. 1043, (1995),* this court has made it clear that:

> ". . . exercise of Federal Admiralty Jurisdiction does not result in automatic displacement of state law. It is true that with Admiralty Jurisdiction comes the application of substantive Admiralty Law. But to characterize that law . . . as Federal Rules of Decision is destructive over-simplification of the highly intricate interplay of the States and the National government in their regulation of maritime commerce. It is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system. But this limitation still leaves the states a wide scope . . . Drawn from state and federal sources, the general maritime law is an amalgam of traditional common law rules, modifications of those rules, and newly created rules. . . . [It is] a fundamental feature of admiralty law that federal admiralty courts sometimes do apply state law. [115 S. Ct. at 1054]

Obviously, the Third Circuit was correct in its finding that there is no Federal Statute pre-empting application of the damage remedies provided by state statute. In this pleasure boat fatality, to paraphrase Justice O'Conner in *Miles v. Apex Marine Corp., 498 U.S. 19, 36 (1990),* the court sails in unoccupied waters. Although maritime tort law for seamen and

longshoremen is now dominated by federal statute, there are no federal statutes applying to pleasure boat fatalities in state waters, other than the three year statute of limitations now contained in 46 U.S.C. §763a.

The Jones Act, 46 U.S.C. App. §688, is limited by its terms only to the claims of seamen against their employers, for injuries and deaths occurring during the course of employment. The statute has no application or influence in a pleasure boat accident not involving employment. Therefore, the concerns as to the statutory constraints upon damages recoverable for the death of a seaman, expressed by the court in *Miles v. Apex Marine Corp., supra,* have no meaning in this pleasure boat fatality.

The only other federal statute applying to maritime accidental deaths is the Death on the High Seas Act, 46 U.S.C. §761, et seq. This statute, by its own terms, excludes coverage of fatalities occurring within state territorial waters. The statute also contains a clear expression of congressional intent that state statutes providing remedies for death shall not be pre-empted in actions arising in the State territorial waters:

> "§767 Exceptions from Operation of Chapter
>
> The provisions of any State statute giving or regulating rights of action or remedies for death shall not be effected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone."

This court had occasion to discuss the effect of §7 of

DOHSA at length in *Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986).* Section 2 of DOHSA provides that the damages recoverable in an action covered by the statute "shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought . . . ." The question before the court was whether the pecuniary damages allowed by DOHSA could be supplemented, in a case to which the statute applied, by damages recoverable under a state wrongful death statute. The Fifth Circuit, in *Tallentire v. Offshore Logistics, Inc., 754 F. 2d 1274 (1985)*, held that under the terms of §7 of DOHSA the plaintiffs were also entitled to recover damages allowed by the Louisiana Wrongful Death Statute, specifically non-pecuniary damages including loss of consortium, service and society. In so holding, the Court of Appeals concluded that §7 was intended to preserve the application of state wrongful death statutes on the high seas.

The Supreme Court reversed, holding that since §2 of DOHSA contained specific provisions as to damages recoverable and the beneficiaries of the cause of action, inconsistent state wrongful death statutes could not be applied in a case involving a death on the high seas within the scope of the Act. Based upon an extensive review of the legislative history behind DOHSA, this court concluded that the intent of the wording of §7, as adopted by congress, was to allow the state courts to retain concurrent jurisdiction along with the Federal Courts, to entertain causes of action arising under DOHSA. In so concluding, however, this court indicated that congress also intended that the states would continue to have

the right to enforce wrongful death remedies provided in state statutes in deaths occurring on territorial waters:

> We conclude that Representative Mann's amendment extended the jurisdictional saving clause to the high seas but in doing so, it did not implicitly sanction the operation of state wrongful death statutes on the high seas in the same manner as the saving clause did in territorial waters." [477 U.S. at 227. emphasis added]

At several other points during the opinion, the court indicated an understanding that the intent of congress in the wording of §7 as adopted was not only to allow the states jurisdiction to adjudicate claims under DOHSA, but also to allow state wrongful death remedies to remain viable for accidents occurring on territorial waters:

> "These references persuade us that the first sentence of §7 was intended only to serve as a jurisdictional saving clause, insuring that state courts enjoyed the right to entertain causes of action and provide wrongful death remedies both for accidents arising on territorial waters and, under DOHSA, for accidents occurring more than one marine league from the shore." [447 U.S. at 221. Emphasis added.]

Consistent with its earlier decision in *Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978)* the court held in *Tallentire* that since DOHSA specified the damages recoverable and the parties entitled to recovery, inconsistent remedies and state statutes are pre-empted by DOHSA where the statute applies, which is on the high seas. Neither *Tallentire* nor *Higginbotham*, however, would preclude other damages in the absence of this

statutory restraint.

II.

THE DAMAGE REMEDIES AVAILABLE FOR PLEASURE BOAT FATALITIES UNDER APPLICABLE STATE STATUTES ARE NOT DISPLACED BY THE GENERAL MARITIME LAW CAUSE OF ACTION, APPLYING TO THE DEATHS OF SEAMEN AND LONGSHOREMEN WHICH WAS RECOGNIZED BY THE COURT IN *MORAGNE* AND *GAUDET*.

The argument will no doubt be made in this case that state wrongful death statutes are pre-empted or displaced by the general maritime law cause of action recognized by this court in *Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970)*; and expanded upon by the court in *Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 (1974)*. Such an argument is enticing on its face, since ordinarily state law is applied in an admiralty case only in the absence of a controlling federal admiralty principle established by statute or decisional law. *Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 337 (1955)*. However, the common law action, recognized in these cases in order to fill unfair gaps in the wrongful death remedies available for seamen and longshoremen, did not establish any controlling federal admiralty principle which specified the damages recoverable in the event of a non-employment death in state waters.

The anomalies in the law which leg to *Moragne* began with the decision in *The Harrisburg, 119 U.S. 199 (1886)*, where the court held that there was no common law cause of action

for wrongful death in admiralty. Therefore, in the absence of a wrongful death statute, the maritime law afforded no remedy. The courts thereafter uniformly applied state wrongful death acts to determine the remedies available for deaths occurring in state territorial waters. See, *e.g. The City of Norwalk, 55 F. 98 (S.D.N.Y. 1893)*. The courts also recognize that, in limited circumstances, some state wrongful death statutes could be found to have extra territorial effect and be applicable to deaths occurring on the high seas. *The Hamilton, 207 U.S. 398 (1907)*. However, in most instances involving fatalities on the high seas, the extension of state wrongful death statutes was an arbitrary process and questionable at best. At times, all recovery for wrongful death on the high seas was denied. *The Middlesex, 253 F. 142 (Mass. 1916)*. In 1920 congress acted to remedy these deficiencies by adopting the Death on the High Seas Act, 46 U.S.C. §761, et seq. In the same year, congress also adopted the Jones Act, 46 U.S.C. App. §688, providing seamen with the same remedies for the injury and death occurring during their employment as where provided to railroad workers under the Federal Employer's Liability Act, 45 U.S.C. §51, et seq.

The unseaworthiness remedy, which had been little used before its application by this court in *Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944)*, and its extension to longshoremen in *Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946)*, began to create problems in the existing statutory scheme for wrongful death remedies. For longshoremen, who had a general maritime law remedy for injury caused by unseaworthiness of

the vessel under *Sieracki*, when the injury resulted in death the question of whether the family had a cause of action depended entirely on state law. The family of the deceased longshoremen had a cause of action only where the applicable state law permitted recovery of damages based upon a concept of liability without fault, such as unseaworthiness. *The Tungus v. Skovgaard, 358 U.S. 588 (1959).*

The other peculiarity which developed was the result of the holding in *Gillespie v. U.S. Steel Corp., 379 U.S. 148 (1964)*, that in adopting the Jones Act to provide a claim for wrongful death based on negligence, Congress pre-empted state wrongful death statutes which allowed a recovery for wrongful death based upon unseaworthiness. Ironically, the death on the high seas act obviously allowed such a cause of action.

These anomalies became intolerable to this court, as contrary to the notion that the court is charged with the duty of protecting those who were considered to be the wards of the admiralty. When confronted with the problem in *Moragne*, the court made it clear that it was acting out of a special solicitude for those who go down to the sea in ships, in recognizing a maritime common law cause of action for wrongful death. In crafting that wrongful death remedy, this court made it clear that its intent was to correct clear deficiencies in the maritime law as it applied to seamen and longshoremen:

> "[T]hese statutes, if construed to forbid recognition of a general maritime remedy for wrongful death within territorial waters, would perpetuate three anomalies of present law. The first of these is simply the discrepancy produced

whenever the rule of the Harrisburg holds sway: within territorial waters, identical conduct violating federal law (here the furnishing of an unseaworthy vessel) produces liability if the victim is merely injured, but frequently not if he is killed. As we have concluded, such a distinction is not compatible with the general policies of federal maritime law.

The second incongruity is that identical breaches of the duty to provide a seaworthy ship, resulting in death, produced liability outside the three-mile limit--since a claim under the Death on the High Seas Act may be founded on unseaworthiness, see Kernan v. American Dredging Co., 355 U.S. 426, 430 n. 4, 2 L Ed 2d 382, 387, 78 S Ct 394 (1958)--but not within the territorial waters of a State whose local statute excludes unseaworthiness claims. . . . [S]ince the substantive duty is federal, and federal maritime jurisdiction covers navigable waters within and without the three mile limit, no rational policy supports this distinction in the availability of a remedy.

The third, and assertedly the 'strangest' anomaly is that a true seamen--that is, a member of a ship's company, covered by the Jones Act--is provided no remedy for death caused by unseaworthiness within territorial waters, while a longshoreman, to whom the duty of seaworthiness was extended only because he performs work traditionally done by seamen, does have such a remedy when allowed by a state statute." [398 U.S. at 395-396, footnotes omitted.]

The court made it clear that it was overruling the *Harrisburg* for the purpose of recognizing a federal remedy for seamen which would not be considered as pre-empted by the Jones Act, while also allowing consistent remedies for injuries and deaths to longshoremen, who then had an unseaworthiness remedy.

Very obviously, the court did not express any intent by recognizing this general maritime law cause of action for seamen and longshoremen, to displace the application of state wrongful death statutes to other fatalities occurring in state waters. The court was obviously concerned with remedying the deficiency at hand, and did not evidence an intent to deprive the states of the power to specify damages in the event of state water fatalities occurring in activities other than federally regulated maritime employment:

> "The resulting discrepancy between the remedies for deaths covered by the Death on the High Seas Act and for deaths that happened to fall within a state wrongful-death statute not encompassing unseaworthiness could not have been foreseen by Congress. Congress merely declined to disturb state remedies at a time when they appeared adequate to effectuate the substantive duties imposed by general maritime law. That action cannot be read as an instruction to the federal courts that deaths in territorial waters, caused by breaches of the evolving duty of seaworthiness, must be damnum absque injuria unless the States expand their remedies to match the scope of the federal duty.

To put it another way, the message of the Act is

> that it does not by its own force abrogate available state remedies; no intention appears that the Act have the effect of foreclosing any non-statuary federal remedies that might be found appropriate to effectuate the policies of general maritime law." [398 U.S. at 399, 400. Emphasis added; footnotes omitted.]

When this court next visited the issue of this wrongful death remedy under general maritime law, in *Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 (1974)*, this court again made it clear that it was acting in the interest of the wards of the admiralty court:

> "In overruling the Harrisburg, Moragne ended these anomalies by the creation of a uniform federal cause of action for maritime death, designed to extend to the dependents of maritime wrongful-death victims admiralty's 'special solicitude for the welfare of those men who under[take] to venture upon hazardous and unpredictable sea voyages.' . . . Our approach to the resolution of the issue before us must necessarily be consistent with the extension of this 'special solicitude' to the dependents of the seafaring decedent." [414 U.S. at 577.]

In *Gaudet*, a case involving a death of a longshoreman in state waters, the court outlined the damages recoverable in the common law death remedy recognized in *Moragne*, drawing heavily on the damages recoverable under the majority of state wrongful death statutes. Still, the court continued to express no intent to displace state wrongful death statutes in other fatalities occurring on state waters:

> "Nothing in the legislative history of the [Death on the High Seas] Act suggests that congress intended the Act's statutory measure of damages to pre-empt any additional elements of damage for a maritime wrongful-death remedy which this court might deem 'appropriate to effectuate the policies of general maritime law.' To the contrary, Congress' insistence that the Act not extend to territorial waters . . . indicates that Congress was not concerned that there be a uniform measure of damages for wrongful deaths occurring within admiralty's jurisdiction, for in many instances state wrongful-death statutes extending to territorial waters provided a more liberal measure of damages than the Death on the High Seas Act. See Greene v. Vantage S.S. Corp., 466 F. 2d 159 (CA 4 1972)." [414 U.S. at 588, n. 22; emphasis added.]

This court dealt with the maritime common law death remedy most recently in *Miles v. Apex Marine Corp., 498 U.S. 19 (1990)*. In that case the court was confronted with the question of whether damages for loss of society could be recovered in the case of a seaman killed in state waters by an unseaworthy condition, when such damages are not included within the pecuniary losses allowed by the Jones Act. Once again, the court acknowledged that the common law death action recognized in *Moragne* was crafted to allow a remedy for the deaths of seamen and longshoremen resulting from unseaworthiness. The common law death action allowed a uniformity of remedies, but did not mandate a uniformity of damages recoverable. Indeed, the court recognized the

continued viability of *Gaudet*, in that the families of longshoremen would be permitted to recover damages for loss of society in a state waters death action. However, the court held that such damages were not available to seamen because they are not within the pecuniary wrongful death damages allowed in the Jones Act:

> "The logic of *Higginbotham* controls our decision here. The holding of *Gaudet* applies only in territorial waters, and it applies only to longshoremen. *Gaudet* did not consider the preclusive effect of the Jones Act for deaths of true seamen. We do so now. . . .
>
> Incorporated FELA unaltered into the Jones Act, congress must have intended to incorporate the pecuniary limitation on damages as well. We assume that Congress is aware of existing law when it passes legislation. . . . There is no recovery for loss of society in a Jones Act wrongful death action.
>
> The Jones Act also precludes recovery for loss of society in this case. The Jones Act applies when a seaman has been killed as a result of negligence, and it limits recovery to pecuniary loss. The general maritime claim here alleged that [the decedent] had been killed as a result of the unseaworthiness of the vessel. It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from

> negligence. We must conclude that there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman. [498 U.S. at 32, 33.]

On the same basis, the court declined to allow the estate of the decedent to recover future loss of earnings, because the survival action incorporated in the Jones Act limits recovery to losses suffered during the decedents' lifetime:

> "We sail in occupied waters. Maritime tort law [for seamen] is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them. Congress has placed limits on recovery in survival actions that we cannot exceed. Because this case involves the death of a seaman, we must look to the Jones Act." [498 U.S. at 36.]

In so holding, the court obviously did not speak to the remedies available to others, whose causes of action are not dominated by federal statute.

Against this backdrop, the Third Circuit was called upon to determine what body of law supplied the principles for the damages recoverable in the death of a twelve year old girl, occurring in a "jet ski" accident in territorial waters. In the decision below, *Calhoun v. Yamaha Motor Corp. 40 F. 3rd 622 (3rd Cir. 1994)*, the court first noted that in admiralty cases, determining when federal maritime law displaces state laws as proven to be a tricky process. In *American Dredging Co. v. Miller, 510 U.S.____, 114 S. Ct. 981 (1994)*, this court indicated that the "unhelpful abstractness" of the language employed in

Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917), left litigants "without a reliable compass for navigating maritime pre-emption problems." [Id. 114 S. Ct. at 991] There this court admitted that it has struggled in setting the boundary between conflicting and non-conflicting state regulations in the area of maritime affairs:

> "It would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernable in our admiralty jurisprudence, or indeed is even entirely consistent within our admiralty jurisprudence." [510 U.S. at _____, 114 S. Ct. at 987]

We believe that the Third Circuit correctly navigated and succinctly summarized the decisions of this court from *Moragne* through *Miles*. It recognized that the common law death remedy crafted in *Moragne* and *Gaudet* was intended to fill gaps between state and federal legislation and eliminate the three "anomalies" existing in the death remedies for seamen and longshoremen after the advent of the unseaworthiness liability remedy. It recognized that the decision of this court in *Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978)* was mandated by the fact that congress had specified the damages recoverable under DOHSA and therefore the court was not at liberty to authorize supplementary relief. Similarly, in *Tallentire* the congress had spoken to the question of damages for deaths on the high seas, and thus the court was not free to supplement the statutory scheme with a state law remedy where DOHSA applied. Finally, in *Miles* the Third Circuit recognized that the Supreme Court was likewise restricted by the damages allowed

under the Jones Act.

More importantly, the Third Circuit correctly concluded from these opinions that, in areas where federal statutes have no application, and an established admiralty principle does not govern, the grafting of remedies from state statutes is appropriate:

> "But importantly for this appeal, *Miles* showed no great hostility to the operation of state statutes in providing rules of decision in admiralty cases.
>
> The passage above quoted ['Congress and the states have legislated extensive in these areas'] hints that state statutory schemes have a role to play in admiralty cases. Such a role received fuller articulation later in the *Miles* opinion, where the court discussed the question whether a general maritime survival action existed. Although it ultimately declined to address the issue, the Court's discussion seemed to sanction some lower courts' practice of applying state survival statutes to deaths at sea . . . ('Most States have survival statutes applicable to tort actions generally, and admiralty courts have applied these state statutes in many instances to preserve suits for injury at sea. . . . .' [40 F. 3rd at 636]"

With the holding of *Gaudet* applying only to longshoremen [*Miles, 498 U.S. at 31*], Yamaha argued below that state law was precluded by the general maritime law remedy, with only the damages provided in DOHSA allowable. The Third Circuit correctly rejected the false logic of this argument:

> "*Tallentire's* interpretation of DOHSA is also important for another reason. It suggests that there is a more fundamental flaw in *Yamaha's* argument that the incorporation of DOHSA's provisions into a *Moragne* cause of action should be treated as displacing all state wrongful death remedies. If *Yamaha* is right, it means that *Moragne* gives DOHSA preclusive effect in an area (maritime deaths in state territorial waters) in which Congress explicitly intended DOHSA to have no such effect. . . . So interpreted, *Moragne* would thus transform a statute explicitly designed to preserve state remedies into one that would displace them. In our view, such a result would cut *Moragne* loose from its conceptual moorings and disregard Supreme Court teachings since *Moragne* that we must look to congressional statutory commands to determine what remedies are available for maritime deaths.
>
> But even if DOHSA is not treated as *explicitly* allowing state law to operate in this area, at the very least the legislative history of DOHSA shows no hostility toward the application of state wrongful death statutes in territorial waters. . . . And since a 'clear conflict' must exist before state law is displaced by federal admiralty law, . . . we cannot find that *Moragne* displaces state wrongful death remedies for deaths of non-seamen in territorial waters. [40 F. 3rd at 642, 643]

We believe that this reasoning is correct and that the decision of the court below is due to be affirmed.

III

POLICY CONSIDERATIONS MANDATE THAT STATE WRONGFUL DEATH STATUTES BE APPLIED IN STATE WATER FATALITIES OCCURRING OUTSIDE OF FEDERALLY REGULATED EMPLOYMENT.

The first policy consideration normally expressed by the courts in determining the breadth of maritime law is the desire to maintain uniformity. However, as the decisions of this court in *Moragne, Gaudet* and other cases illustrate, the needed uniformity is in the primary duties governing the conduct of the parties. This was the obvious motivating factor in the recognition of the common law death remedy in *Moragne*:

> "There is no question in this case of any change in the duties owed by shipowners to those who work aboard their vessels. Shipowners well understand that breach of the duty to provide a seaworthy ship may subject them to liability for injury regardless of where it occurs, and for death occurring on the high seas or in the territorial waters of most states. It can hardly be said that shipowners have molded their conduct around the possibility that in a few special circumstances they may escape liability for such a breach. Rather, the established expectations of both those who own ships and those who work on them are that there is a duty to make the ship seaworthy and that a breach of that federally imposed duty will general provide a basis for recovery. It is the exceptional denial of recovery that disturbs these expectations. 'If the new remedial doctrine serves simply to reinforce and make more effectual well-understood primary obligations, the

net result of innovation may be to strengthen rather than to disturb the general sense of security.'" [398 U.S. at 403, 404]

The lower courts have consistently recognized that the uniformity that is fundamental in maritime law has to do with the bases of liability, not with differing elements of damages that may be recoverable in differing circumstances with differing classes of beneficiaries. *Dennis v. Central Gulf S.S. Lines, 453 F. 2d 137 (5th Cir. 1972); Greene v. Vantage S.S. Corp., 466 F. 2d 1059 (4th Cir. 1972).*

In the field of pleasure boat accidents, this court has recognized the need for uniform application of the maritime rules which govern the conduct of the parties, as well as uniform principles governing liability and defenses applied in post accident litigation. *Foremost Ins. Co. v. Richardson, 457 U.S. 668 (1982); Sisson v. Ruby, 497 U.S. 358 (1990).* In cases of alleged defective products, such as this one, this court has also recognized established principles for product liability. *East River S.S. Corp. v. TransAmerican Delavell, 476 U.S. 858 (1986).* However, neither this court nor the congress has ever required uniformity in the assessment of damages recoverable for wrongful death. Indeed, this court required non-informity of damages when it found that the *Moragne* remedy was available to seamen, but without the *Gaudet* damages allowed to Longshoremen. *Miles, 498 U.S. at 27-31.*

Since the decisions in *American Dredging Co. v. Miller, 510 U.S.___, 114 S. Ct. 981 (1994),* and *Jerome B. Grubart, Inc. v. Great Lakes Dredge and Dock Co., ___U.S.___, 115 S. Ct.*

1043 (1995), this court has employed a balancing of interests test in resolving apparent conflicts between state and federal law in admiralty cases. In the absence of an applicable federal statute, or an established maritime law principle governing the question, there is no reason why state law should not apply, provided it does not unreasonably impact maritime commerce. In the balancing of interests on the question at hand, this court should consider that a state should have the right to expect that its wrongful death statutes will provide uniform principles of damage recovery for deaths occurring within its territory. If state death statutes happen to provide greater damages than DOHSA, the only effect would be to encourage more uniform compliance with the duties which govern the conduct of the parties in the first instance, by perhaps making it more expensive for a wrongdoer to kill his victim, rather than merely injure him. It is also reasonable for Yamaha to expect uniform death remedies within the boundaries of a given state. Yamaha has no reason to expect that its liability and damages will be less when its product is a jet ski on the water, than when is product is a motorcycle on the land a short distance away. Certainly manufacturers do not mold their conduct around the possibility that in some instances they may escape the reach of state statutes.

The denial of state law remedies in a pleasure boat fatality occurring in state waters, where no federal statute is controlling, would violate the wisdom expressed by Chief Justice Chase in *The Seagull*, 21 F. Cas. 909 (4th Cir. 1865), which has frequently been quoted with approval by this court:

> "There are cases, indeed, in which it has been held that in a suit at law, no redress can be had by the surviving representative for injuries occasioned by the death of one through the wrong of another; but . . . certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules." [Id at 910]

An attempt to transfer the damage remedies afforded by DOHSA and the Jones Act to state water pleasure boat accidents will too often result in the denial of a remedy. When congress enacted DOHSA and the Jones Act, it obviously was acting with the seafarer in mind. Most often applicable in an employment situation, the damages allowed for accidental death by these statutes deal mainly with the replacement of financial losses suffered by widows and children. Since the Jones Act provides a seaman with the remedy for job injury, and also considering the fact that liability principles based upon slight negligence and strict liability in unseaworthiness weigh heavily in the seaman's favor, some statutory restriction on damages is understandable.

However, the pecuniary damage principles selected by congress for application to the death of a breadwinner at sea do not work well in pleasure boat and jet ski fatalities, where the victim is more often a child such as Natalie Calhoun, a housewife, or a retired person who has no dependents. It certainly becomes the humane character of the admiralty to allow the remedy afforded by state wrongful death statutes in these cases, since the admiralty is not constrained by federal

statute to withhold the remedy.

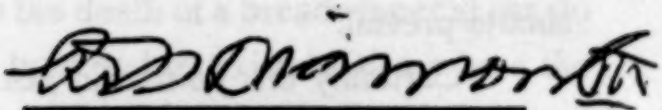
The application of state statutes to such cases is particularly appropriate in view of the fact that many of the lower courts have read far more into the meaning of the *Miles* decision than this court could ever have intended. For instance, many courts have concluded that *Miles* precludes the recovery of punitive damages in admiralty, a subject not even discussed by the Supreme Court in that case. See, for example, *Guevara v. Maritime Overseas Corp, 59 F. 3rd 1496 (5th Cir. 1995)*. In other jet ski cases, other courts have carried the Jones Act pecuniary damage limitation from *Miles* over into the non-employment death of a child, leaving the parents with a nominal remedy for wrongful death. *Wahlstrom v. Kawasaki Heavy Industry, Ltd., 4 F. 3rd 1084 (2nd Cir. 1993)*. Indeed, in an opinion not yet released for publication, the Alabama Supreme Court has read so much into the *Miles* opinion that the parents of a child killed in a jet ski accident may have no more remedy than the recovery of funeral expenses. *Choat v. Kawasaki Motors Corp., 1994 Amc. 2626 (Ala. 1994, application for rehearing pending)*. In effect, pleasure boat fatalities could become "damnum absque injuria" if this interpretation of *Miles* should prevail.

Certainly this court did not intend such harsh results should flow from its decision in *Miles*. It is very unlikely that congress intended or anticipated such results in its 1920 legislation aimed at providing remedies to seamen for job injuries and remedies for deaths on the high seas.

CONCLUSION

For these reasons, we believe that this court should affirm the Third Circuit, and hold that state wrongful death statutes are applicable to pleasure boat fatalities occurring in state waters. This result is consistent with the intent of congress in its maritime legislation to date, and certainly consistent with the prior opinions of this court. Such a result would produce uniform damage remedies for wrongful deaths occurring within a given state, while preserving the uniformity of the maritime duties which govern the conduct of the parties in the first instance. If for any reason this court should feel constrained to conclude that state statutes cannot apply in these circumstances, then we would urge the court to re-open the writ in this case to also resolve the second question presented in the petition for certiorari, so as to resolve the growing uncertainty as to the damages recoverable in a state water pleasure boat fatality.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing upon all parties, by depositing a copy of the same in the United States Mail, properly addressed and first class postage prepaid this 15 day of September 1995.

ROSS DIAMOND III

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